89-987 (1)

Supreme Court, U.S.
FILED
DEC 21 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

STANDARD OIL COMPANY OF CALIFORNIA, *et al.*,
Petitioners,

v.

THE CITY OF LONG BEACH and
the STATE OF CALIFORNIA,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether, in a price-fixing conspiracy case where there is no direct evidence of conspiracy, the court of appeals erred in reversing summary judgment in favor of defendants without determining whether an inference of conspiracy was more probable than an inference of independent action.

2. Whether the court of appeals erred in holding that an antitrust conspiracy, which required the participation of all alleged conspirators to succeed, can be inferred when (A) the motive for the alleged conspiracy is contrary to the economic interest of some of the alleged conspirators and (B) where only consciously parallel conduct has been proved.

PARTIES

The parties to the proceeding below were: Exxon Corporation, Mobil Oil Corporation, Shell Oil Company, Chevron Corporation (formerly Standard Oil of California), Texaco Inc., Union Oil Company, the City of Long Beach and the State of California. The petitioners are Mobil Oil Corporation, Shell Oil Company, Chevron Corporation, and Union Oil Company. The parent companies, subsidiaries (except wholly owned subsidiaries), and affiliates of the petitioners are listed in Appendix F, *infra*, App. A-80 to A-94.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES	ii
OPINIONS BELOW	1
JURISDICTION	1
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
A. Background	3
B. Proceedings Below	6
REASONS FOR GRANTING THE PETITION	13
CONCLUSION	29

TABLE OF AUTHORITIES

Cases	Page
A & M Records, Inc. v. *A.L.W.*, 855 F.2d 368 (7th Cir. 1988)	19
Anderson v. *Liberty Lobby, Inc.*, 477 U.S. 242 (1986)	18
Apex Oil Co. v. *DiMauro*, 822 F.2d 246 (2d Cir.), *cert. denied*, 108 S. Ct. 489 (1987)	20
Bogosian v. *Gulf Oil Corp.*, 561 F.2d 434 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978)	18
Collins v. *Associated Pathologists*, 844 F.2d 473 (7th Cir.), *cert. denied*, 109 S. Ct. 137 (1988)	23
E.I. Du Pont De Nemours v. *FTC*, 729 F.2d 128 (2d Cir. 1984)	28
First Nat'l Bank of Arizona v. *Cities Service Co.*, 391 U.S. 253 (1968)	*passim*
Gibson v. *Greater Park City Co.*, 818 F.2d 722 (10th Cir. 1987)	19
Helicopter Support Systems v. *Hughes Helicopter*, 818 F.2d 1530 (11th Cir. 1987)	19, 20
In re Workers' Compensation Ins. Antitrust Litigation, 867 F.2d 1552 (8th Cir.), *cert. denied*, 109 S. Ct. 3247, 110 S. Ct. 72 (1989)	23
International Distrib. Centers, Inc. v. *Walsh Trucking*, 812 F.2d 786 (2d Cir.), *cert. denied*, 482 U.S. 915 (1987)	19
Interstate Circuit v. *United States*, 306 U.S. 208 (1939)	26, 27
Matsushita Elec. Indus. Co. v. *Zenith Radio Corp.*, 475 U.S. 574 (1986)	*passim*
McCabe's Furniture, Inc. v. *La-Z-Boy Chair Co.*, 798 F.2d 323 (8th Cir. 1986), *cert. denied*, 108 S. Ct. 1728 (1988)	19, 20
Monsanto Co. v. *Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984)	*passim*
Palmer v. *BRG of Georgia, Inc.*, 874 F.2d 1417 (11th Cir. 1989)	23
Park v. *El Paso Bd. of Realtors*, 764 F.2d 1053 (5th Cir. 1985), *cert. denied*, 474 U.S. 1102 (1986)	20

TABLE OF AUTHORITIES—Continued

Page

Parkway Gallery Furniture, Inc. v. *Kittinger/ Pennsylvania House Group*, 878 F.2d 801 (4th Cir. 1989) 19, 20, 22
Poller v. *Columbia Broadcasting Sys.*, 368 U.S. 464 (1962) 22, 23
Richards v. *Neilson Freight Lines*, 810 F.2d 898 (9th Cir. 1987) 24
Smith v. *Northern Michigan Hospitals, Inc.*, 703 F.2d 942 (6th Cir. 1983) 18
Southway Theatres, Inc. v. *Georgia Theatre Co.*, 672 F.2d 485 (5th Cir. Unit B 1982) 18
Street v. *J.C. Bradford & Co.*, 886 F.2d 1472 (6th Cir. 1989) 23
The Jeanery, Inc. v. *James Jeans, Inc.*, 849 F.2d 1148 (9th Cir. 1988) 15, 20
Theatre Enterprises, Inc. v. *Paramount Film Distrib. Corp.*, 346 U.S. 537 (1954) 27
Tunis Bros. Co. v. *Ford Motor Co.*, 823 F.2d 49 (3d Cir. 1987), *cert. denied*, 108 S. Ct. 1013 (1988) 20
United States v. *Chas. Pfizer & Co.*, 367 F. Supp. 91 (S.D.N.Y. 1973) 28
Valley Liquors, Inc. v. *Renfield Importers*, 822 F.2d 656 (7th Cir.), *cert. denied*, 484 U.S. 977 (1987) 19
Weit v. *Continental Ill. Nat'l Bank & Trust Co.*, 641 F.2d 457 (7th Cir. 1981), *cert. denied*, 455 U.S. 988 (1982) 18, 24, 28
Weyerhaeuser Co. v. *Lyman Lamb Co.*, 50 U.S.L.W. 3841 (U.S. April 20, 1982) 19
Weyerhaeuser Co. v. *Lyman Lamb Co.*, 456 U.S. 971 (1982), *cert. dismissed*, 462 U.S. 1125 (1983) 18

Statutes

Sherman Act, 15 U.S.C. § 1 ..... *passim*
28 U.S.C. § 1254(1) 1

TABLE OF AUTHORITIES—Continued

Other Authorities	Page
VI P. Areeda, *Antitrust Law* (1986)	15, 25, 27, 28
P. Areeda & H. Hovenkamp, *Antitrust Law* (1989 Supplement)	15, 20
R. Bork, *The Antitrust Paradox* (1978)	27
Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach*, 21 Stan. L. Rev. 1562 (1969)	27
L. Sullivan, *Antitrust* (1977)	27

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Petitioners,

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THE CITY OF LONG BEACH and
the STATE OF CALIFORNIA,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 872 F.2d 1401, and is included in the Appendix at pp. A-1 to A-18. The order of the court of appeals denying rehearing and amending its opinion is included at pp. A-19 to A-21. The relevant opinions of the district court are set out in the Appendix at pp. A-22 to A-79.

JURISDICTION

The opinion and judgment of the court of appeals was entered on April 17, 1989. Timely petitions for rehearing were denied on September 22, 1989. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared to be illegal."

STATEMENT OF THE CASE

Petitioners are four major integrated oil companies [1] who have purchased heavy crude oil since 1965 from the respondents, the City of Long Beach and the State of California. In this 14 year-old antitrust action, respondents allege that, from 1961 through 1977, petitioners conspired to fix or maintain artificially low prices for crude oil, particularly heavy crude, in California and respondents demand treble damages of approximately $800 million. After almost a decade of discovery, respondents have "no direct evidence" of this alleged conspiracy. App. A-10. Thus, the fundamental issue in this case concerns the antitrust standard for granting summary judgment when plaintiffs rely only on circumstantial evidence in attempting to prove a price-fixing conspiracy.

After reviewing at length the evidence of parallel conduct and industry practices which respondents proffered as circumstantial evidence of conspiracy, and considering it in light of petitioners' evidence of the independent reasons for each petitioner's conduct, the district court granted summary judgment for petitioners. The district court concluded that all of the circumstantial evidence was "equally in accord with the legitimate pursuit of independent interests." App. A-56. The court of appeals,

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[1] The four petitioners are Mobil Oil Corporation, Shell Oil Company, Chevron Corporation (formerly Standard Oil Company of California), and Union Oil Company of California. Two other defendants below, Exxon Corporation and Texaco Inc., intend to file a separate petition for certiorari.

without citation to the record and without any discussion of each petitioner's evidence of the independent reasons for its actions, reversed. In so doing, the court of appeals applied a different antitrust standard than did the district court. The court of appeals never determined or even inquired whether the circumstantial evidence made an inference of conspiracy more probable than the competing inference of independent action. The court of appeals instead held that an antitrust conspiracy could be inferred from the fact that petitioners engaged in consciously parallel conduct. What makes this case worthy of review by this Court is that the court of appeals' decision both reflects and exacerbates the widespread and longstanding confusion among the courts of appeals over the antitrust standard, applicable on summary judgment, for inferring a conspiracy from circumstantial evidence, and in particular over the scope and meaning of this Court's decision in *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986).

A. Background.

Respondent City of Long Beach, as both proprietor and trustee for respondent State of California, holds mineral rights to a portion of the Wilmington Oil Field in Southern California. In 1965, Long Beach entered into a 35-year agreement with petitioners, who contracted to develop and operate the Wilmington Field, and agreed to pay Long Beach for the heavy crude oil produced from the Field at a price to be determined, in part, by reference to prices posted for crude oil in the Field and nearby fields in Southern California.

A posted price is a published assertion by a purchaser of the price it is willing to pay for various grades of crude oil located in a particular field. App. A-28.[2] The

[2] Among the petitioners only Mobil, Standard, and Union actually posted prices in fields in California during the relevant time period. App. A-37. Shell and Exxon have never posted prices in California,

prices posted for heavy crude were stable throughout much of the 1960's, a time when supplies of heavy crude oil increased dramatically as a percentage of total California production and when the federal government administered a program designed to stabilize oil prices.[3] Until the federal government imposed rigid price controls in 1971, each petitioner obtained all of the heavy crude it needed for its refineries at prevailing market prices. *Id.* at A-33. Prices did increase in 1969 and again several times in the early 1970's. *Id.* at A-32, A-39.

For a refiner, the quality of oil is partly a function of the oil's gravity or density: "Lighter crude oil is more conducive to being refined into gasoline than is heavier crude oil, which normally is converted into fuel oil or other relatively less expensive products." *Id.* at A-29. Refiners thus generally offer a lower price for heavy crudes than for lighter crudes. Wilmington crude is a heavy crude oil.

Respondents alleged that the stability of posted prices in the 1960's was circumstantial evidence of price-fixing. They also alleged that such prices were artificially low, citing as evidence that each petitioner paid less for such crude than its internal "refining value." A refining value is an estimate of the revenue from the products that a particular refiner's equipment can derive from a barrel

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and Texaco has not posted since the early 1960's. Posting is a long-standing practice in the oil industry and is not itself challenged in this lawsuit.

[3] Through the period of the alleged conspiracy the federal government administered various programs that affected oil prices. The Mandatory Oil Import Program ("MOIP"), which began in 1959, was designed and operated in practice to stabilize crude oil prices in the western United States by permitting the importation of sufficient inexpensive foreign crude oil to fill any "gap" between domestic supply and demand at the prevailing prices. Moreover, from 1971 through 1977, prices were fixed by government-imposed price ceilings. *See* App. A-23 to A-28.

of a particular type of crude oil. Each petitioner uses a different method to calculate these internal values. Moreover, refining values vary from company to company and over time, in part because of wide variations in (1) the processing equipment available to a refiner at any moment, (2) the product prices it hopes to get and (3) the the products it must produce to meet its contractual and distributor obligations.

Refinery operators around the world regularly make these calculations, and use them in choosing which crude oils to acquire among those available at any given time. Naturally, the refining value for successful refineries will exceed the purchase price of the crude oil. Indeed, each refiner attempts to maximize its profit by obtaining that combination of crude oils whose current "refining value" exceeds cost by the widest margin.

Respondents further alleged that a conspiracy could be inferred from the frequent exchanges of oil among petitioners. Such exchanges, respondents claimed, allowed petitioners to deal with each other without having to use and thereby increase the allegedly "artificially depressed" posted prices. In fact, exchanges are a long-standing efficiency in the petroleum industry (and in many other industries). For example, when one firm's crude is closer to a second firm's refinery than to its own, it ships that crude to the second refinery in exchange for crude oil owned by the second firm that is closer to the first's refinery. The exchange can "save transportation costs and result in lower prices to consumers of petroleum products." App. A-75. Exchanges are done as a form of barter transaction; that is, oil is exchanged for oil, in order to guarantee both parties a secure supply of raw material. Exchanges thus had "no material effect upon the overall supply of or demand for crude oil" and were "by definition a wash." *Id.* at A-76.

Because of the great variation in the quality of California crude oils within small geographic areas, oil could

not be exchanged simply on a barrel-for-barrel basis; some more precise form of measurement was needed to ensure that each party to the transaction received oil equivalent to what it gave up. Frequently, exchanges were made on the basis of posted prices: oil was exchanged barrel-for-barrel but followed by "adjustments in cash made by reference to the corresponding posted prices of the crude oils." *Id.* at A-75.

Respondents alleged, however, that petitioners' use of an alternative common denominator in accounting for some exchanges was evidence of price-fixing. Petitioners, like other California refiners since the 1930's, accounted for some exchanges by using a relatively precise measurement, called "three-cut," which measures the volume of three specific unfinished products that a particular crude oil could yield under simple, standard refining techniques. The three cuts, which refer to the products of distilling crude oil at each of three ranges of temperature,[4] provided refiners with a much more precise measure of a crude oil's ultimate refinery yield in distillation than did gravity. *Id.* at A-76 to A-77. The three-cut measurement was useful in yet another way. In exchanging oil, crudes of different quality sometimes were commingled during transportation to a refinery. Use of the three-cut method made it possible, despite this mixing of different crude oils, for refiners to be kept whole in terms of the refinery yield of the crude oil they delivered and received.

B. Proceedings Below.

1. In June, 1975, Long Beach brought suit in the United States District Court for the Central District of California alleging that petitioners conspired to fix prices

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[4] Cut 1 is a measure of petroleum products that vaporize at temperatures less than 400°F (*e.g.* unfinished gasoline), Cut 2 at temperatures between 400°F and 550°F (*e.g.* diesel, home-heating oil), and Cut 3 the remainder.

in violation of Section 1 of the Sherman Act.[5] The State filed a similar antitrust suit, and the cases were consolidated. During the next eight years, the district court actively managed the litigation, supervising exhaustive discovery and ruling on numerous interim motions for summary judgment.[6] At the close of discovery, the court ordered respondents to file a comprehensive and preclusive pretrial brief setting forth the evidence they relied upon to support their claims. Compare *Matsushita*, 475 U.S. at 578 (describing pretrial procedure which was also followed here). Petitioners then filed individual and extensive summary judgment motions, on which the district court held two weeks of hearings.

The district court granted each petitioner's motion for summary judgment. The district court ruled that "[a]fter more than eight years of discovery, the plaintiffs simply do not have the evidence to prove the antitrust conspiracy that they allege." *Id.* at A-28.[7] The court held that "plaintiffs have no direct evidence of . . . a conspiracy." *Id.* at A-29, A-56. In the absence of direct evidence, the court analyzed plaintiffs' circumstantial evidence as follows:

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[5] The complaint also included a breach of contract claim, which the district court dismissed in 1979. Respondents later filed new contract suits in 1985 and 1986, which the district court dismissed and which were addressed by the court of appeals in a separate opinion handed down the same day as the opinion in this case. *See* 872 F.2d 1410. A separate petition for certiorari has been filed seeking review of this judgment.

[6] One of these interim rulings, denying both plaintiffs' and defendants' motions for summary judgment on three-cut exchanges, is included in the Appendix to this petition. *See* App. A-61 to A-72

[7] As an alternative basis for granting summary judgment, the district court held that any injury claimed by respondents would have resulted from the federal government's Mandatory Oil Import Program, price ceilings, and entitlements program, and not the alleged conspiracy. Although the court of appeals reversed, no issue concerning those rulings is presented in this petition.

> If we start out with conspiracy as an established fact, some of the conduct of some of the defendants regarding some of the plus factors can be harmonized with that assumption. *However, such conduct is equally in accord with the legitimate pursuit of independent interests.*

Id. at A-56 (emphasis added). The district court concluded that any inference of conspiracy that a jury might draw would necessarily be based on " 'speculation, surmise, and conjecture.' " *Id.* (citation omitted).

The district court rejected respondents' allegation that an inference of conspiracy could be drawn from the "consciously parallel" activity of posting and paying largely uniform and stable prices for heavy crude oil in the 1960's. The court held that each posting refiner had legitimate, independent reasons to post such prices. Prices were uniform because no rational refiner could afford "to pay more for crude oil than its competitors paid and remain competitive," nor could it "afford to reduce its prices below those of its competitors, lest its suppliers exercise their rights to cancel their contracts . . . ." *Id.* at A-38. Prices were stable because of the burdens created by "transitory changes in postings," [8] and because refiners "did not need to pay more in order to fulfill their requirements." *Id.*

The district court also rejected respondents' claim that the disparity between petitioners' internal "refining values" and posted prices was evidence that posted prices were artificially low. The district court recognized that the supply of and demand for crude oil—and not a buyer's internal calculations of relative value—determine the market price, and accordingly concluded that, regardless of petitioners' various internal valuations of crude oil,

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[8] The district court explained that "posted prices were relied upon in determining royalty payments, depletion allowances, and inventory costs [and this] tended to discourage transitory changes in . . . postings." App. A-38.

petitioners had no rational reason to pay more than the posted price. *Id.* at A-31 to A-32. Even respondents' economist admitted that his refining value study alone would not permit him to conclude that petitioners had conspired; he conceded that in the absence of any evidence that petitioners had experienced a shortage of crude oil, his study was "equally consistent" with either independent action or collusion.[9] Predictably, respondents attempted to argue that petitioners had experienced shortages of oil that should have caused them to post higher prices. After careful review, however, the district court concluded that there was no evidence in the record to support this allegation, and found that petitioners "had no difficulty in acquiring, at posted prices, all of the crude oil that their refineries could utilize." *Id.* at A-33.[10]

Respondents next alleged that petitioners' use of the three-cut measure to account for some exchanges of crude

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[9] Supp. ER 4329-4331, 4336-4340; ER 3410, ¶ 78; *see also* Supp. ER 5005-5021. ("ER" and "Supp. ER" refer to record excerpts on appeal.)

The district court also rejected respondents' claim that posted prices were artificially low, holding that the posted price of heavy crude oil was determined by what small refiners, who lacked sophisticated equipment and were less efficient than petitioners, were willing to pay. "Unless there was a shortage of heavy crude oil, the price would have been set by the marginal refiners," for whom the value of heavy crude was low but whose purchases were necessary to clear the market. *Id.* at A-31. Heavy crude was worth relatively little to them because they lacked the sophisticated equipment to extract a high proportion of valuable light products from it.

[10] The district court concluded that Exxon documents, upon which respondents had largely relied, "were referring to *anticipated* inadequacies of *domestic* crude supply to a particular refinery. In some instances, the expected shortage did not materialize; in others, it was overcome by the importation of foreign crude oil." App. A-32 (emphasis in original). *See id.* at A-48 to A-49 (respondents never rebutted Exxon's showing that importation of foreign oil was the least expensive method of addressing shortages).

oil provided petitioners with a method of maintaining posted prices at a depressed level. Respondents offered various theories, but never a clear explanation or any evidence, of how such exchanges could have affected posted prices. The district court, however, found that such exchanges had no impact on the supply or demand for crude oil (*id.* at A-76), and so, by definition, could not have affected price. The district court thus concluded that the exchanges resulted simply in "the defendants being kept in relatively close balance, both as to amounts of crude oil delivered and received and the respective gravities of such oil." *Id.* at A-45. The district court also found that petitioners had numerous independent and legitimate reasons to engage in such exchanges (*id.* at A-74 to A-79), and concluded, after reviewing all of plaintiffs' submissions regarding three-cut exchanges as well as its own prior ruling, that " 'apart from the speculations of the plaintiffs, there is no evidence of an agreement, express or otherwise, designed to avoid increasing posted prices . . . ." *Id.* at A-46.[11]

Finally, the district court concluded that there was no plausible common motive for a conspiracy. Exxon was exclusively a producer and seller of crude oil until 1969, and Texaco, respondents themselves had admitted, had an interest in obtaining higher, not lower, crude prices. *Id.* at A-36. Indeed, under respondents' theory, Exxon and Texaco were members of a conspiracy that, during the 1960's, would have cost them $67 million and $33 million, respectively, as a result of the artificially depressed price

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[11] The district court specifically rejected respondents' speculation that petitioners had used meetings conducted in 1961-62 to revise the technical specifications for the various cuts as an opportunity to agree to fix or maintain posted prices. The district court concluded that there was "no indication . . . [of] any discussion with respect to posted prices" at those meetings (App. A-45), and that the meetings served the legitimate purpose of revising technical specifications to measure more accurately the aspects of crude oil that had become important to some refiners. *Id.*

they would have received for the heavy crude oil they sold. Furthermore, petitioners made significant business decisions that were wholly inconsistent with a conspiracy to depress the price of heavy crude.[12] The district court concluded that "in many instances" petitioners' actions were "completely inconsistent" with the alleged conspiracy (*id.* at A-56), and that petitioners lacked "any common motivation" to conspire. *Id.* at A-37.

2. The court of appeals reversed. Like the district court, the court of appeals found no direct evidence of conspiracy. Indeed, the court specifically rejected respondents' principal claim on appeal that "the three-cut exchange agreement is unlawful *per se*" as a form of price fixing. *Id.* at A-8.

Nevertheless, the court of appeals concluded that the circumstantial evidence was sufficient to require that the case, by then 14 years old, must now go to a jury. Unlike the district court, which granted summary judgment after determining that petitioners' conduct "is equally in accord with the legitimate pursuit of independent interests," the court of appeals reversed the entry of summary judgment without ever considering whether plaintiffs' circumstantial evidence made an inference of conspiracy more probable than an inference of independent action. The court stated simply that "[a]n inference of collusive action reasonably and plausibly may be made based on the evidence presented," and denied summary judgment on that basis. *Id.* at A-13.

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[12] For example, under respondents' theory, each petitioner would have had an incentive to acquire the sophisticated refining equipment, such as a coker, that is needed to refine heavy crude oil and thus to take advantage of its depressed price. Yet Union has never installed a coker in its Southern California refinery, Chevron never installed a coker in four of its five West Coast refineries, and Shell waited until 1970-71, some ten years after respondents alleged that the conspiracy was formed, to install its coker.

Unlike the district court, the court of appeals never considered the independent and legitimate reasons why the petitioners posted and paid the prices they did. It held instead that "under the doctrine of conscious parallelism" petitioners could be liable for price-fixing simply upon a showing that they "were aware" that posted prices were lower than their internal refining value calculations. *Id.* The court also asserted, without reference to the record, that "market conditions should have caused some of the companies to post higher crude prices" and that the district court "incorrectly concluded that the city's evidence related only to anticipated shortages." *Id.* at A-11.

In evaluating respondents' allegations concerning three-cut exchanges, the court of appeals acknowledged the evidence that three-cut exchanges (1) permitted the parties "to move oil from fields to refineries as efficiently as possible" (*id.* at A-6); (2) had "justifiable purposes" (*id.* at A-8); and (3) "were necessary to everyday oil operations." *Id.* at A-10. Nevertheless, it held that a jury could reasonably draw an inference of conspiratorial price-fixing because three-cut exchanges "were cumbersome and inconvenient to maintain." *Id.* The court did not determine whether this inference was more plausible than the inference that the exchanges served legitimate business purposes. *Id.* at A-11.

Finally, the court of appeals held that respondents' allegations as to petitioners' motive to conspire formed a sufficient basis for an inference of conspiracy. The court acknowledged that "the participation of all the companies was necessary to make the plan work" (*id.* at A-12), and it conceded that Texaco and Exxon, who were interested in higher crude prices, could not have shared the others' motives. *Id.* The court of appeals nevertheless held that the district court erred in not crediting respondents' pure speculation that "access to pipelines and long term

refining plans" provided a motive for Exxon and Texaco to join the conspiracy. *Id.*

The court of appeals' opinion is as striking for what it says as for what it ignores. The court of appeals stated that consciously parallel pricing at a noncompetitive level is a sufficient basis for an inference of conspiracy; that ambiguous evidence of anticipated shortages without any clear evidence of actual shortages of heavy crude oil could support an inference of conspiracy; that a showing of a motive to keep posted prices low by itself is sufficient for an inference of conspiracy; and that net sellers of crude oil plausibly could share a motive with net buyers of crude oil to depress prices. *Id.* at A-8 to A-13.

At the same time, the court of appeals never cited to a single page in the record to support its assertions concerning the facts of the case. It ignored the district court's detailed analysis of the evidence which was based upon its long familiarity with the case. And, most telling, while the court of appeals cited this Court's decision in *Matsushita*, it never considered whether respondents had shown that an inference of antitrust conspiracy was more probable than the competing inference of independent action that the district court found dispositive.

REASONS FOR GRANTING THE PETITION

The fundamental legal issue in this case—determining when circumstantial evidence alone gives rise to an inference of antitrust conspiracy sufficient to warrant a jury trial—has been a recurring and difficult one for courts to resolve. The question is critical to antitrust law, because Section 1 of the Sherman Act draws a "basic distinction between concerted and independent action," *Monsanto Co.* v. *Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984), and because "mistaken inferences . . . chill the very conduct the antitrust laws are designed to protect." *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*,

475 U.S. 574, 594 (1986). Despite the overriding importance of this issue, this Court has yet to resolve this question in a manner that has succeeded in bringing consistency to the decisions of the lower courts.

This case provides a telling illustration of the confusion that plagues the federal judiciary. As petitioners argue *infra*, *Matsushita* requires on summary judgment that a court evaluate a plaintiff's circumstantial evidence of antitrust conspiracy not in isolation, but in comparison with the competing inferences of independent action that the evidence supports. Based on this comparison, the court must decide whether conspiracy is a more likely explanation of parallel conduct than independent action. If the evidence is as consistent with independent action as it is with conspiracy, a jury could not reasonably conclude that the evidence tends to exclude the possibility of independent action, and summary judgment must be entered for the defendants. To do otherwise would allow a jury to find a conspiracy based on undue speculation, thereby chilling pro-competitive practices.

The petition also should be granted because the court of appeals, in holding that a conspiracy may be inferred merely from "conscious parallelism" in maintaining supposedly non-competitive prices, adopted a rule that conflicts with settled principles of antitrust law established by this Court and followed by other circuits. Moreover, the court allowed a jury to infer a six-company conspiracy to maintain low crude prices when the conceded interest of two of the companies was in obtaining higher crude oil prices, and when the participation of all six companies was allegedly essential to the plan's success. Finding a material dispute of fact regarding motive solely on the basis of counsel's speculation treats the motive requirement cavalierly, and violates proper summary judgment standards. In these ways, the decision below compounds the confusion in the lower courts over the threshold requirements for denying summary judg-

ment in circumstantial-evidence cases arising under Section 1 of the Sherman Act.

I.

The decision of the court of appeals raises the fundamental question under Section 1 of the Sherman Act of when a plaintiff's circumstantial evidence of antitrust conspiracy warrants a jury trial.[13] One line of cases clearly indicates that the Sherman Act requires a plaintiff to present sufficient proof to make it more probable than not that the defendants conspired rather than acted independently. A separate, and somewhat older, line of decisions indicates that a motion for summary judgment should be granted sparingly in an antitrust case, and that an inference of conspiracy need not be more probable than an inference of independent action in order to raise a genuine issue for trial. Not surprisingly, this tension has caused courts of appeals to decide conspiracy issues in divergent ways, with the Second, Seventh, and Tenth Circuits routinely applying a different standard than the one used by panels in the Fifth, Eighth, and Eleventh Circuits and by the panel below, and with persistent inconsistencies within circuits. This case directly presents this important issue because the holding below cannot be sustained if Section 1 of the

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[13] The Supreme Court has never given much guidance on how courts determine whether an unlawful combination exists for the purpose of Section 1." *The Jeanery, Inc.* v. *James Jeans, Inc.*, 849 F.2d 1148, 1162 (9th Cir. 1988) (Reinhardt, J., dissenting). *See generally* P. Areeda & H. Hovenkamp, *Antitrust Law*, ¶¶ 316.1, 1405′, 1413′ (1989 Supplement) (discussing divergent approaches to question presented here following *Matsushita*); *see also* VI P. Areeda, *Antitrust Law*, ¶¶ 1405, 1410-1415, 1424, 1426, 1433-1436 (1986) (discussing relevance of a "motive" to conspire, the absence of an "independent reason" for the actions in question, the presence of conduct "contrary to the economic self-interest" of the actor, and the presence of "interdependence," and explaining that the lower courts have failed to articulate satisfactory rules for determining what facts are (1) necessary and (2) sufficient to support an inference of conspiracy).

Sherman Act requires respondents to show that petitioners' conduct is more likely the product of conspiracy than of independent action.

That issue was most recently addressed by this Court in *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986), a case involving an alleged conspiracy to engage in predatory pricing. The plaintiffs in *Matsushita* alleged that Japanese manufacturers of consumer electronic products had secretly agreed to employ predatory pricing to drive United States firms out of the domestic market. The Court held that the circumstantial evidence relied upon by plaintiffs could not support an inference of conspiracy under Section 1 of the Sherman Act. The Court reasoned that:

> *antitrust law limits the range of permissible inferences from ambiguous evidence in a section 1 case....* To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 must present evidence ' "that tends to exclude the possibility" ' that the alleged conspirators acted independently. [*Monsanto*], 465 U.S. at 764. Respondents in this case, in other words, must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed respondents. See *Cities Service, supra*, at 280.

475 U.S. at 588 (emphasis added).

Matsushita plainly holds that, when there is no direct evidence of an antitrust conspiracy, the Sherman Act itself requires summary judgment to be entered unless plaintiff carries its burden of showing that conspiracy is a more probable explanation of parallel conduct than independent action. See also *id.* at 597 n.21 ("conduct that is as consistent with permissible competition as with illegal conspiracy does not, without more, support even an inference of conspiracy").

This interpretation of *Matsushita* follows both from the language of the opinion and its explicit reliance on two prior decisions of this Court. In *First Nat'l Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253 (1968), the Court affirmed the entry of summary judgment for the defendant against a claim of a conspiracy to boycott. In so holding the Court reasoned:

> [N]ot only is the inference that [defendant's] failure to deal was the product of factors other than conspiracy at least equal to the inference that it was due to conspiracy, thus negating the probative force of the evidence showing such a failure, but *the former inference is more probable.*

Id. at 280 (emphasis added). This passage in *Cities Service* was cited twice by the Court in *Matsushita* in explaining the standard it announced in the latter case. See *Matsushita*, 475 U.S. at 588.

Similarly, the Court in *Matsushita* relied heavily upon the prior decision in *Monsanto* v. *Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984). In that case, this Court addressed whether plaintiff had produced sufficient circumstantial evidence to support an inference of a price-fixing conspiracy between a manufacturer and its distributors (a "vertical" conspiracy). The Court first noted the great difficulty courts had experienced in resolving this question, *id.* at 759 n.5, and then emphasized the need to respect lawful independent action by manufacturers and the pro-competitive exchange of information between manufacturers and distributors. *Id.* at 761-64. Accordingly, the Court concluded that "[t]here must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently" to support an inference of conspiracy. *Id.* at 764. Although *Monsanto* was a vertical conspiracy case affirming a jury verdict, the Court in *Matsushita* reasoned that *Monsanto's* analysis was in essence no different from that employed in *Cities Service*, and was therefore equally

applicable to the evaluation on summary judgment of circumstantial evidence of a horizontal conspiracy. *Matsushita*, 475 U.S. at 587-88.

Petitioners submit that *Matsushita* and its predecessors plainly establish the antitrust principle that when a plaintiff has no direct evidence of antitrust conspiracy, such a conspiracy *may not be inferred* from circumstantial evidence alone unless the plaintiff shows that an inference of conspiracy is more probable than an inference of independent action. Such a principle is warranted by the particular demands of antitrust law, acknowledged in *Matsushita*, which require that pro-competitive and independently motivated conduct not be chilled by the prospect of a jury trial based on mere speculation of collusion. Claims that do not meet this threshold simply fail to meet an element of proof, and therefore do not warrant a jury trial. See *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 252-56 (1986).

The decisions following *Matsushita*, however, reflect a deep division between and within the courts of appeals, a division that has existed at least since *Cities Service*.[14]

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[14] *Compare Weit* v. *Continental Ill. Nat'l Bank & Trust Co.*, 641 F.2d 457, 463 (7th Cir. 1981), *cert. denied*, 455 U.S. 988 (1982) ("when the plaintiff or prosecution relies on circumstantial evidence alone, the inference of unlawful agreement rather than individual business judgment must be the compelling, if not exclusive, rational inference") *and Bogosian* v. *Gulf Oil Corp.*, 561 F.2d 434, 446 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978) (circumstantial evidence not enough unless it makes "the inference of rational, independent choice less attractive than that of concerted action") *with Southway Theatres, Inc.* v. *Georgia Theatre Co.*, 672 F.2d 485, 495 (5th Cir. Unit B 1982) ("[t]he ultimate inference that a conspiracy existed need not be more probable than the inference that the refusal to deal resulted from independent business judgment"); *cf. Smith* v. *Northern Michigan Hospitals, Inc.*, 703 F.2d 942, 947-48 & n.11 (6th Cir. 1983) (distinguishing *Weit*).

The split in the lower courts served as the basis for the petition for certiorari granted by this Court in *Weyerhaeuser Co.* v. *Lyman Lamb Co.*, 456 U.S. 971 (1982), *cert. dismissed*, 462 U.S. 1125

Some courts have carefully scrutinized the record to determine whether the circumstantial evidence was more consistent with an inference of conspiracy than with an inference of independent action. See, *e.g.*, *A & M Records, Inc.* v. *A.L.W.*, 855 F.2d 368, 372 (7th Cir. 1988) (affirming summary judgment because plaintiff "failed to adduce any evidence giving rise to an inference of conspiracy in light of the more plausible inference that each [defendant acted] independently"); *International Distrib. Centers, Inc.* v. *Walsh Trucking*, 812 F.2d 786, 795 (2d Cir.), *cert. denied*, 482 U.S. 915 (1987) (same); *Gibson* v. *Greater Park City Co.*, 818 F.2d 722, 724 (10th Cir. 1987) (same); see also *Parkway Gallery Furniture, Inc.* v. *Kittinger/Pennsylvania House Group*, 878 F.2d 801, 804-06 (4th Cir. 1989) (alleged vertical conspiracy); *Valley Liquors, Inc.* v. *Renfield Importers*, 822 F.2d 656, 660-61 (7th Cir.), *cert. denied*, 484 U.S. 977 (1987) (same). Because, on the summary judgment record in those cases, an inference of illegal agreement was no more probable than that of independent action, those courts held that summary judgment must be granted.

Other courts, however, including the panel in this case, while not explicitly rejecting *Monsanto* and *Matsushita* (which they cannot do), nevertheless have continued to review circumstantial evidence *without* determining whether the inference of conspiracy is more plausible than that of independent action. For example, in *McCabe's Furniture, Inc.* v. *La-Z-Boy Chair Co.*, 798 F.2d 323, 328 (8th Cir. 1986), *cert. denied*, 108 S. Ct. 1728 (1988), and in *Helicopter Support Systems* v. *Hughes Helicopter*, 818 F.2d 1530 (11th Cir. 1987), panels in the Eighth and

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(1983). The principal question presented by the petition was whether an antitrust "conspiracy [could] properly be inferred from parallel business conduct . . . when conduct is consistent with what would be expected in competitive market." 50 U.S.L.W. 3841, 3842 (U.S. April 20, 1982). That case, however, was settled and the writ was dismissed prior to argument. 462 U.S. 1125 (1983).

Eleventh Circuits each acknowledged *Matsushita* as controlling, but analyzed the circumstantial evidence presented *without* considering whether that evidence made an inference of conspiracy more probable than the inference of independent action. The inconsistency of such analysis with *Matsushita* was noted by the Fourth Circuit in *Parkway Gallery*, 878 F.2d at 806 & n.4. There, the Court stated that the decisions in *McCabe's Furniture* and in *Helicopter Support Systems* "have in effect misconstrued 'tends to exclude the possibility' of independent conduct, *Matsushita*, 475 U.S. at 588, to mean something like 'arguably consistent with the possibility of a conpiracy.'" 878 F.2d at 806, n.4.[15] See also *Park* v. *El Paso Bd. of Realtors*, 764 F.2d 1053, 1060-61 (5th Cir. 1985), *cert. denied*, 474 U.S. 1102 (1986) (jury must choose between competing explanations of conspiracy and independent action).[16]

Nowhere is the confusion plaguing the lower courts more evident than in the panel opinion below. On the one hand, the panel nodded to *Matsushita* as the controlling precedent and cited *Monsanto* for the proposition

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[15] The confusion over the meaning of *Matsushita* effectively divided the panel in *The Jeanery, Inc.* v. *James Jeans, Inc.*, 849 F.2d 1148, 1157-60 (9th Cir. 1988). There, the majority "scrutiniz[ed] the evidence" to determine whether the inference of conspiracy was reasonable in light of an inference of independent action, and was vigorously criticized by the dissent for adopting "in effect, a 'beyond all reasonable doubt' standard" that required plaintiff to produce evidence that "preclude[s] an interpretation of independent action." *Id.* at 1163 (Reinhardt, J., dissenting). *Compare also Tunis Bros. Co.* v. *Ford Motor Co.*, 823 F.2d 49, 51 (3d Cir. 1987), *cert. denied*, 108 S. Ct. 1013 (1988) *with id.* at 51-52 (Hunter, J., dissenting). *See also Apex Oil Co.* v. *DiMauro*, 822 F.2d 246, 253-54 (2d Cir.), *cert. denied*, 108 S. Ct. 489 (1987) (discussing how "a court might find it difficult" to apply *Matsushita* in case involving consciously parallel conduct and several plus factors).

[16] *See* P. Areeda and H. Hovenkamp, *Antitrust Law* 869-71 (1989 Supplement) (discussing *Park*).

that a plaintiff's "evidence must tend to exclude the possibility that the defendants acted independently . . . ." App. A-7, A-13. On the other hand, the panel utterly failed to evaluate whether the circumstantial evidence presented made an inference of conspiracy more probable than an inference of independent action. For example, unlike the district court, the court of appeals never asked the controlling question whether, in light of the long history of and numerous undisputed efficiencies provided by three-cut exchanges, respondents' claim that the exchanges were "cumbersome and inconvenient to maintain" made an inference that the exchanges facilitated a conspiracy more probable than an inference that they facilitated the efficient transportation of oil. *Id.* at A-11 to A-12. Similarly, the court of appeals simply ignored the independent business reasons discussed by the district court that explain why crude oil prices remained stable and parallel. The court of appeals never asked whether it was more probable than not that petitioners were unable to obtain at posted prices all of the oil they needed to run their refineries or why a secret conspiracy to fix prices was the more probable explanation of stable posted prices.[17]

By ignoring petitioners' independent reasons to post or to pay parallel prices, calculate refining values, and use three-cut measurements in making some exchanges, the court of appeals was free to speculate about ways in which such activity might be consistent with an inference that petitioners had conspired to fix prices. The court of appeals' conclusion that an inference of conspiracy could plausibly be drawn from petitioners' con-

[17] The same is true of the remaining circumstantial evidence referred to by the court of appeals. App. A-10 to A-12. Nowhere does the panel compare the probability of the competing inference. Indeed, the tone and substance of the opinion reflect a preoccupation with respondents' allegations (*e.g.*, *id.* at A-10, referring to "rigged prices") rather than with the actual evidence presented and the plausibility of the proposed inferences from that evidence.

sciously parallel activity was possible only because the court never examined the plausibility of an inference of independent action. The court of appeals' decision is thus flatly inconsistent with *Matsushita*. Like panels in the Fifth, Eighth, and Eleventh Circuits, the panel below "misconstrued 'tends to exclude the possibility' of independent conduct, *Matsushita*, 475 U.S. at 588, to mean something like 'arguably consistent with the possibility of a conspiracy.'" *Parkway Gallery*, 878 F.2d at 806 n.4. If this case had been decided in the Second, Seventh, or Tenth Circuits, the result would have been different.

There are at least three reasons why this Court's decision in *Matsushita* has not eliminated the longstanding inconsistency among the courts of appeals on the standard for inferring antitrust conspiracy, and hence why it is imperative that this Court revisit the issue. First, the dissenting opinion of four justices in *Matsushita* expressly challenged the majority's argument that *Cities Service* and *Monsanto* support a holding that the antitrust laws require the district judge to determine whether the evidence adduced by a plaintiff undermines any inference of independent action before granting summary judgment:

> If the Court intends to give every judge hearing a motion for summary judgment in an antitrust case the job of determining if the evidence makes the inference of conspiracy more probable than not, it is overturning settled law. If the Court does not intend such a pronouncement, it should refrain from using unnecessarily broad and confusing language.

475 U.S. at 601 (dissenting opinion). Thus, the dissent suggests that the majority's opinion did not succeed in defining a clear standard.

Second, this Court's much earlier decision in *Poller* v. *Columbia Broadcasting Sys.*, 368 U.S. 464 (1962), supports the proposition that summary judgment "should be used sparingly in complex antitrust litigation." *Id.*

at 473. Because nothing in *Matsushita*, *Monsanto*, or *Cities Service* directly rejects this earlier statement, lower courts have been left free to approach the summary judgment issue without clear direction from this Court. *E.g.*, *In re Workers' Compensation Ins. Antitrust Litigation*, 867 F.2d 1552, 1563 & n.19 (8th Cir. 1989), *cert. denied*, 109 S. Ct. 3247, 110 S. Ct. 72 (1989) (finding *Poller* "[p]articularly appropriate").[18]

Third, *Matsushita* was a predatory pricing case and the Court's opinion stressed the inherent improbability that the defendants would conspire to pursue predatory aims in that case. Because predatory pricing cases are somewhat unique under the Sherman Act, it is not wholly disingenuous to question whether the rule in *Matsushita* necessarily applies beyond the specific circumstances in that case. Indeed, on rehearing, the panel below withdrew its statement distinguishing this case from *Matsushita* on this ground, although it did not otherwise change its opinion. App. A-20 to A-21; see also *Palmer* v. *BRG of Georgia, Inc.*, 874 F.2d 1417, 1430-31 (11th Cir. 1989) (Clark, J., dissenting).

These sources of ambiguity in the law controlling summary judgment in Section 1 cases can only be eliminated by a decision of this Court. What is more, without review of the issue presented here, the serious harm to competition from the persistent confusion in the lower courts over the meaning of Section 1 will continue. The holdings of the courts of appeals, including the panel below, that summary judgment may be denied without any consideration as to whether the circumstantial evidence of conspiracy makes an inference of conspiracy

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[18] In contrast, many courts have interpreted *Matsushita* as implicitly overruling *Poller*, and even as establishing a "new evidentiary standard for summary judgments." *Collins* v. *Associated Pathologists*, 844 F.2d 473, 476 (7th Cir.), *cert. denied*, 109 S. Ct. 137 (1988); *Street* v. *J.C. Bradford & Co.*, 886 F.2d 1472, 1478 (6th Cir. 1989) (*Matsushita* "alter[ed] prior summary judgment law").

more probable than an inference of independent action, mean that companies that make pricing decisions individually and for justifiable business reasons, and that cooperate in developing efficient and stable methods of delivering goods to consumers (such as the three-cut exchange),[19] must face the burden of a protracted jury trial and potentially enormous liability—in this case, nearly $800 million. This is not what the Sherman Act was intended to allow, which is precisely what this Court held three years ago in *Matsushita*. Because companies continue to be exposed to trial under these circumstances in some circuits and not in others, it is necessary for the Court to resolve this persistent and longstanding inconsistency and in so doing to provide the guidance under the Sherman Act that the lower courts and the business community need.

II.

The second legal issue posed by the holding of the court of appeals, which is related to the first but provides an alternative basis for resolving this case, is whether an antitrust conspiracy that requires the participation of all alleged members to succeed can be inferred when (A) the motive for the alleged conspiracy is contrary to the economic interest of some of the alleged conspirators and (B) only consciously parallel conduct has been shown. By holding that liability under Section 1 of the Sherman Act may be found in such circumstances, the court of appeals clearly departed from settled principles of antitrust law established by this Court.

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[19] An express agreement on the technical definitions of the three-cut measurement, which was used in connection with efficiency-enhancing oil exchanges, is not a sufficient basis for inferring a conspiracy. *See Weit* v. *Continental Ill. Bank & Trust Co.*, 641 F.2d 457, 459-66 (7th Cir. 1981), *cert. denied*, 455 U.S. 988 (1982) ("compatible charge card system" required collaboration among banks); *Richards* v. *Neilson Freight Lines*, 810 F.2d 898, 902-04 (9th Cir. 1987) (Kennedy, J.) ("more efficient delivery" by trucking companies promoted by "gentlemen's rule").

A. The court of appeals' holding on motive contains two errors, and each error provides an independent basis for this Court's review. First, after reviewing the evidence and assertions regarding motive, the court stated: "Whether this evidence will support at least an inference of an agreement among the companies is a question for the trier of fact." App. A-13. As *Matsushita* makes plain, however, a finding of motive alone, while necessary, is not a sufficient basis on which to infer a conspiracy. 475 U.S. at 596-97 & n.21; see generally VI P. Areeda, *Antitrust Law* ¶ 1412g (1986).

Second, the court of appeals erred in finding that respondents made a sufficient showing that petitioners shared a motive to conspire when, without question, petitioners' motives were substantially divergent. As this Court established in *First Nat'l Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253, 288 (1968), an inference of conspiracy may not be drawn, and summary judgment must be granted, where the economic incentives of the defendant are "substantially divergent" from the object of the alleged conspiracy. From the outset, the essential premise of respondents' parallel conduct case has been that petitioners shared a common motive to conspire to depress crude oil prices because they were all net buyers of heavy crude during the alleged conspiracy period—*i.e.*, they produced less oil than they needed for their refineries and thus were required to purchase additional oil. This premise is demonstrably false. It is undisputed that at the time the conspiracy was allegedly formed, and for nearly a decade thereafter, both Exxon and Texaco were *substantial sellers* of heavy crude oil, and therefore stood to lose millions of dollars from any artificial depression of crude prices. Exxon and Texaco thus would have been the principal victims of the conspiracy that respondents have alleged.[20]

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[20] For example, according to respondents' damage theory, Exxon would have suffered net losses of some $67 million over that period as a result of the alleged underpricing conspiracy, and Texaco

This divergence in petitioners' motives regarding crude oil prices is dispositive—not simply for two members, but for the entire conspiracy. Respondents have consistently maintained, and the court of appeals expressly found, that "the participation of all the companies was necessary to make the plan work . . . ." App. A-12. There is not a shred of evidence anywhere in the record to support a theory of a four-company conspiracy. The district court therefore correctly concluded that the lack of "any common motivation" among petitioners to depress buying prices precluded an inference of the six-company conspiracy that respondents alleged. App. A-37.

B. Finally, perhaps the most startling error in the decision of the court of appeals is its holding that evidence of "conscious parallelism" is by itself a sufficient basis from which to infer an antitrust conspiracy. At the outset of its opinion, the court of appeals asserted blunty: "To prove its case at trial, the city must convince the trier of fact that the companies conspired, *or at least acted in conscious parallel*, to fix and post artificially" low prices. App. A-9 to A-10 (emphasis added).[21] In its subsequent discussion, relying on this Court's decision in *Interstate Circuit* v. *United States*, 306 U.S. 208 (1939) and on an argument in a 20-year old law review article never embraced by any other court,[22] the court of appeals concluded that a showing of consciously parallel

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would have suffered losses of approximately $33 million. Respondents' speculation, which the court of appeals endorsed despite the lack of any significant probative evidence, that Exxon and Texaco accepted these losses to gain access to pipelines and in anticipation of becoming net buyers in the future, is no more plausible than the predatory pricing claim advanced in *Matsushita*. The absence of any plausible motive for Exxon or Texaco to depress crude oil prices is discussed at greater length in a separate petition for certiorari.

[21] The court of appeals did not alter this statement or its subsequent discussion of conscious parallelism, even though petitioners directly challenged this in petitions for rehearing, and even though the court of appeals did amend a different passage of its opinion.

conduct, chiefly that petitioners "were aware" that posted prices were at non-competitive levels, is itself sufficient to establish liability under the "doctrine of conscious parallelism." *Id.* at A-12.

Until the decision of the court of appeals in this case, it was settled that such evidence of consciously parallel activity was not sufficient to justify an inference of conspiratorial price-fixing. Indeed, in *Theatre Enterprises, Inc.* v. *Paramount Film Distrib. Corp.*, 346 U.S. 537 (1954), this Court cautioned lower courts against precisely the sort of expansive reading of *Interstate Circuit* that the court of appeals adopted here. In *Theatre Enterprises*, this Court held that *agreement*, and not consciously parallel activity, is what the Sherman Act prohibits: " 'conscious parallelism' has not yet read conspiracy out of the Sherman Act." 346 U.S. at 541. See VI P. Areeda, *Antitrust Law* ¶ 1426 (1986). Accordingly, it is not surprising that, apart from one law review article, there is no support for the view that evidence of persistent and conscious pricing at a non-competitive level can support an inference of conspiracy. By embracing the reasoning of that article, the court of appeals has ignored this court's pronouncement in *Theatre Enterprises* and created a significant conflict in the circuits on this issue.

The courts of appeals that have addressed the question consistently have refused to allow an inference of con-

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[22] *See* App. A-12 (citing Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach*, 21 Stan. L. Rev. 1562, 1575-88 (1969), for proposition that "non-competitive pricing by oligopolists" violates Section 1). *But see* L. Sullivan, *Antitrust* 359 (1977) ("Posner . . . is simply not convincing"); R. Bork, *The Antitrust Paradox* 174-75 (1978) ("Posner's approach . . . is likely to produce a series of convictions of firms that have in fact done nothing at all reprehensible"); VI P. Areeda, *Antitrust Law* ¶ 1432d1-2 (1986) (discussing several "fatal . . . flaws" in Posner's approach).

spiracy to be drawn from consciously parallel pricing behavior. See, *e.g.*, *E. I. Du Pont De Nemours* v. *FTC*, 729 F.2d 128, 139 (2d Cir. 1984) ("mere existence of an oligopolistic market structure in which a small group of manufacturers engage in consciously parallel pricing of an identical product does not violate the antitrust laws"); *Weit*, 641 F.2d at 462 ("[p]arallel behavior and the hope that something further can be developed at trial is not sufficient to warrant a trial on the merits"); see also *United States* v. *Chas. Pfizer & Co.*, 367 F. Supp. 91, 101 (S.D.N.Y. 1973) ("parallel pricing . . . standing alone, does not indicate price fixing"); see generally VI P. Areeda, *Antitrust Law* ¶ 1433a & n.3 (1986).

The court of appeals offered no reason to depart from the basic principle that evidence of conscious parallelism alone is an insufficient basis for a finding of conspiracy, and no such reason exists. As the district court understood, the fact that petitioners were able to obtain at posted prices all of the oil they needed to run their refineries meant that no petitioner had any incentive to pay a higher price—regardless of its internal calculation of the value of the oil. Each petitioner could therefore determine independently that it was not in its interest to post or to pay a higher price than it did. As noted above, *supra* page 9, even respondents' economist conceded that absent any evidence that petitioners were not able to obtain all of the oil they needed at posted prices, the fact that petitioners' internal valuations of oil were higher than posted prices was equally consistent with independent action as with conspiracy.

* * * * * *

The court of appeals' cavalier treatment of a case that the district court carefully managed for almost a decade and exhaustively scrutinized in reaching a judgment has created in the Ninth Circuit a number of dangerous antitrust principles that warrant review by this Court. The court of appeals mistakenly held that a showing of motive

was a sufficient basis for inferring a conspiracy, that a plausible showing of motive for a six-company conspiracy could be made where the object of the conspiracy was contrary to the economic self-interest of two of the companies, and that circumstantial evidence of consciously parallel pricing is a sufficient basis for a finding of liability under Section 1. Issues as fundamental as the role of motive and parallel conduct in creating a jury issue of conspiracy under the Sherman Act deserve serious consideration by this Court in any case. Review is particularly appropriate here where these basic legal principles have been tortured in ways that deviate from prior decisions of other courts, and therefore expose petitioners' legitimate, pro-competitive business practices both to the hazards of protracted litigation concerning events decades old, and potentially to condemnation under the antitrust laws by a jury. Because a trial in this case is fundamentally at odds with the core purposes of the Sherman Act, and because the court of appeals abdicated its responsibility under *Matsushita* to determine whether conspiracy was more plausible than independent action, review of this decision below is appropriate now.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDICES

TABLE OF CONTENTS

Page

APPENDIX A

Slip Opinion of the United States Court of Appeals for the Ninth Circuit, April 17, 1989 ..... 1a

APPENDIX B

Order of the United States Court of Appeals for the Ninth Circuit Amending the Slip Opinion and Denying the Petition for Rehearing and Suggestion for Rehearing *En Banc*, September 22, 1989.. 19a

APPENDIX C

Memorandum of Decision of the United States District Court of the Central District of California Granting Defendants' Summary Judgment Motions Regarding Antitrust Claims, September 19, 1985 ..... 22a

APPENDIX D

Memorandum of Decision of the United States District Court of the Central District of California, October 17, 1984 ..... 61a

APPENDIX E

Findings of Fact of the United States District Court of the Central District of California Regarding Three-Cut Exchanges, October 17, 1984 ..... 73a

APPENDIX F

Pursuant to Sup. Ct. R. 28.1, a list of the parent companies, subsidiaries (except wholly owned subsidiaries), and affiliates of each corporate petitioner 80a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 86-5859
D.C. Nos. CV-75-2232-WPG, CV-76-2839

CITY OF LONG BEACH, as trustee for the state of California,
Plaintiff-Appellant,

v

STANDARD OIL COMPANY OF CALIFORNIA; TEXACO, INCORPORATED; EXXON CORPORATION; UNION OIL COMPANY OF CALIFORNIA; MOBIL OIL CORPORATION; SHELL OIL COMPANY, *Defendants-Appellees.*

STATE OF CALIFORNIA, on behalf of itself and all political subdivisions and special districts within the state similarly situated, *Plaintiff-Appellant,*

v.

STANDARD OIL CO., *et al.*,
Defendants-Appellees.

No. 86-5860
CV-82-3252-WPG

CITY OF LONG BEACH,
Plaintiff-Appellant,

v.

STANDARD OIL CO., *et al.*,
Defendants-Appellees.

IN RE: COORDINATED PRETRIAL PROCEEDINGS IN PETROLEUM PRODUCTS ANTITRUST LITIGATION—MDL 150

Appeals from the United States District Court
for the Central District of California
William P. Gray, District Judge, Presiding

Argued and Submitted
October 4, 1988—San Francisco, California

Filed April 17, 1989

Before: Mary M. Schroeder, Jerome Farris and
Cecil F. Poole, Circuit Judges.

Opinion by Judge Farris

OPINION

FARRIS, Circuit Judge:

The City of Long Beach and the State of California appeal the district court's grant of summary judgment to the defendants, six major California oil companies.[1] The city charged the companies with conspiring to depress the posted price of crude oil in violation of federal

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[1] The defendants-appellees are Standard Oil Co. of California (now Chevron Corp.), Exxon Corp. (formerly Humble Oil & Refining Co.), Mobil Oil Corp., Shell Oil Co., Texaco, Inc., and Union Oil Co. of California. The seventh defendant, Atlantic Richfield Co., settled with plaintiffs and was dismissed from these suits on December 13, 1984.

and state antitrust laws.[2] The record satisfies us that the plaintiffs presented sufficient evidence to establish genuine issues of material fact in support of their claims. We reverse and remand for trial.[3]

BACKGROUND

Thte City of Long Beach, both as trustee for state lands and as proprietor, owns oil produced from the Wilmington Oil Field. *See* 1964 Cal. Stats., Ch. 138 (1st Extra. Sess.). The field extends 11 miles southeast from the Wilmington District of Los Angeles through Long Beach Harbor and the offshore area of the City of Long Beach. Production from the 7,825 acre onshore portion began in the 1930s. In 1954, the city planned and supervised a seismic survey to determine the extent of the

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[2] Three consolidated cases are invloved in this appeal. D.C. No. CV-75-2232 was filed in June 1975 by the City of Long Beach; counts one and two of the second amended complaint alleged antitrust violations in the defendants' purchase of oil produced from lands owned in trust by the city for the benefit of the State of California. D.C. No. CV-76-2839 is a class action suit by the State of California on behalf of itself and its political subdivisions; the fifth cause of action of the second amended complaint alleged a conspiracy to depress crude oil prices and was severed and consolidated with No. 75-2232. The district court certified its summary judgment award on the antitrust claims as final under Fed. R. Civ. P. 54(b).

D.C. No. CV-82-3252 was filed by the City of Long Beach in June 1982 and alleged federal and state antitrust claims for oil produced from lands owned by the city in its proprietary capacity, as opposed to as trustee.

We have jurisdiction pursuant to 28 U.S.C. § 1291.

[3] We also decide today in a separate opinion an appeal from the district court's award of summary judgment against the city on the pendent state contract claims included in the complaint filed in D.C. No. CV-75-2232. *City of Long Beach v. Standard Oil Co.*, —— F.2d —— (9th Cir. 1989). That opinion also considers the removal of state law claims, originally filed in state court in 1986, concerning a later time period.

southeasterly offshore portion of the field. Problems with land subsidence arising from the onshore production delayed development of the offshore oil. In February 1962, after the preparation of a comprehensive development plan by the Harbor Department, city voters approved offshore drilling. The California State Lands Commission approved the city's proposal to develop the 6,400 acre offshore area in late 1964.

In order to develop and market the oil from the 1.5 billion barrel field, in March 1965 the city sold interests in its production. The interests were awarded for a 35-year period based on bids for a percentage of the expected market price of the oil. A consortium composed of five of the companies (Texaco, Exxon, Union, Mobil, and Shell) obtained an 80% share, which also obligated the group to perform day-to-day operations as Field Contractor. Chevron and ARCO jointly obtained shares totalling 10% of production. The remaining 10% share went to companies not involved in this litigation. The winning bids ranged from 95.56% for the Field Contractors' share to 100% for a 5% share won by Chevron and ARCO.

A Contractors' Agreement, executed by the parties in March 1965 after two years of preparation and discussion, contained detailed pricing provisions for the oil sold to the companies.[4] The price was based substantially upon the arithmetical average of prices "posted" during the month by major purchasers in the Wilmington field and other named fields. Posted prices are prices that a prospective purchaser publicly declares it is willing to pay for crude oil. Chevron, ARCO, Mobil, and Union were the only purchasers to regularly post prices in the Wilmington field.

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[4] A more detailed discussion of the pricing provisions is contained in our companion opinion on the contract claims.

In 1975, the City of Long Beach and the State of California brought suit against seven major California oil companies charging violations of federal and state antitrust statutes. The city alleges that the companies conspired to fix and maintain uniform, noncompetitive posted prices for the kind of crude oil produced from the Wilmington field, and that those postings were below the prices that buyers in a free, open market would have paid.

The district court granted summary judgment on several alternative grounds. On July 19, 1984, the court entered partial summary judgment for the companies for the period April 12, 1972 to October 1, 1976, concluding that federal price controls supplanted the alleged conspiracy as the effective reason for the crude oil price levels. On December 17, 1984, the court entered partial summary judgment for the period November 1, 1974 through 1977, based on the federal Entitlements Program's effect on the value of the city's oil. On September 19, 1985, the court entered a complete summary judgment for the companies. The court found that the federal Mandatory Oil Import Program precluded recovery for the remaining period of alleged liability, June 27, 1971 to April 12, 1972, and as an alternative ground that the city had failed to present sufficient evidence to prove the alleged antitrust conspiracy.

We review the district court's grant of summary judgment de novo. *Harkins Amusement Enterprises, Inc. v. General Cinema Corp.*, 850 F.2d 477, 482 (9th Cir. 1988), *cert. denied*, 109 S.Ct. 817 (1989). To overcome summary judgement the non-moving party "must establish that there is a genuine issue of material fact" and demonstrate more than "some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-86 (1986). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party,

there is no 'genuine issue for trial.'" *Id.* at 587 (citing *First National Bank of America v. Cities Service Co.*, 391 U.S. 253, 289 (1968), Fed. R. Civ. P. 56(e)).

In reviewing the summary judgment motion we accept the city's undisputed allegations as true:

(1) The California oil market is isolated and dominated by the defendant companies. This dominance encompasses the production, transportation, and refining sectors of the industry.

(2) The posted prices for heavy crude oil generally were stable throughout the period of the alleged conspiracy (1961-1977). Price increases did occur in 1969, 1970, and 1973.

(3) The composition of crude oil varies. Heavier-weight crudes generally are less desirable for refinery feed stock than lighter-weight crudes. For a given refinery configuration, the lighter-weight crude can be refined into a larger volume of more valuable "light" products (i.e., gasoline as opposed to fuel oil). Alternatively, a greater capital investment in refinery equipment is required to produce light products from a heavy crude. As a result of this difference in value, lighter weight crude generally is more expensive than heavier weight oil. Crude oil weight is measured on gravity scale in degrees. The difference in price for crude oil of varying weights on a posted price schedule is known as the "gravity price differential." The oil owned by the city was a heavy crude.

(4) The companies engaged in barter transactions, called three-cut exchanges, to move oil from fields to refineries as efficiently as possible. The accounting for the substantial volumes of oil traded in three-cut exchanges was not done on the basis of posted prices, but on refinery product yields adjusted to balance volumes.

(5) In 1961-62, employees of five out of the six defendant companies met to discuss and revise the tech-

nical specifications for the three-cut exchanges. The parties disagree over whether the meetings were secret and whether the city was aware of the widespread use of three-cut exchanges.

DISCUSSION

A. Legal Standard

Section 1 of the Sherman Act declares illegal "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce . . . ." [15 U.S.C. § 1. Section 4 of the Clayton Act allows any person "injured in his business or property by reason of anything forbidden in the antitrust laws [to] recover threefold the damages by him sustained. . . ." 15 U.S.C. § 15(a).

To maintain a successful action, the city must show a contract, combination, or conspiracy that restrains trade and causes harm to itself and to competition in general. *See Matsushita*, 475 U.S. at 586; *Christofferson Dairy, Inc. v. MMM Sales, Inc.*, 849 F.2d 1168, 1172 (9th Cir. 1988); *see also USA Petroleum Co. v. Atlantic Richfield Co.*, 859 F.2d 687, 697 (9th Cir. 1988) (concluding that injury done to market and to competitors by vertical, non-predatory, maximum price-fixing conspiracy is antitrust injury). The city must present "direct or circumstantial evidence that reasonably tends to prove . . . a conscious commitment to a common scheme designed to achieve an unlawful objective." *Montanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 768 (1984). Although conspiracy may be inferred from circumstantial evidence, the evidence must tend to exclude the possibility that the defendants acted independently and lawfully. *Id.* at 763-64; *Wilcox v. First Interstate Bank of Oregon, N.A.*, 815 F.2d 522, 525 (9th Cir. 1987). In analyzing the evidence at the summary judgment stage of an antitrust action, "plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of

each." *See Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962) (remanding for new trial); *Wilcox*, 815 F.2d at 526.

The city claims that the three-cut exchange agreement is unlawful *per se*. Whatever the effect of the three-cut exchanges on posted prices, the agreement concerning the exchanges themselves cannot be flatly clasified as a price-fixing arrangement. *Cf. Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 349-51 (1982). On their face, the three-cut exchanges cannot be held to have a single purpose of stifling competition. As explained below, the exchanges have other justifiable purposes, and so should be scrutinized under the Rule of Reason. *See Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 19-20 (1979); *Coastal Transfer Co. v. Toyota Motor Sales, U.S.A.*, 833 F.2d 208, 211 (9th Cir. 1987); *see also Business Electronics Corp. v. Sharp Electronics Corp.*, 108 S. Ct. 1515, 1519-20 (1988).[4]

B. The Conspiracy

The city claims that the companies violated the antitrust laws by conspiring to maintain an artificially low posted price for Wilmington oil. The city alleges that the companies accomplished this by using three-cut exchanges and artificially high gravity price differentials to maintain a dual price structure. Posted prices allegedly were kept low to reduce the companies' payments to the city for the publicly-owned Wilmington oil, while the companies used three-cut exchanges to maintain market values in transactions among themselves. The city further alleges that in the absence of this anticompetitive behavior, market forces would have increased the price of the Wilmington oil. More specifically, the city asserts that:

1) In their posted prices, the defendants systematically undervalued heavy crude oils, resulting in the underpricing of the city's oil.

(2) The gravity price differentials for the companies' posted prices were artificially large in comparison to the value of the oil in the market place, resulting in the underpricing of the city's oil.

(3) The purpose of the three-cut exchange was to escape the problematic consequences of the deliberate underpricing in posted prices of the city's oil. The three-cut exchanges enabled the companies to trade crude oil at market value and avoid the market distortions caused by the artificially low posted prices.

(4) The 1961-62 technical meetings were held secretly to further this purpose.

(5) The companies operated their private pipelines, adhered to posted prices, exchanged price information, and set the gravity price differentials for Alaska Cook Inlet oil in a manner that assisted their policy of underpricing heavy California oil.

(6) The companies experienced shortages of heavy crude oil in California such that, in an open market, higher prices would have resulted.

(7) The refinery value of various crude oils—that is, the dollar value of the products obtained from processing a given barrel of oil in a particular refinery—is material to the pricing issues raised by the antitrust claims.

(8) The federal Mandatory Oil Import Program, in effect from 1959-73, did not prevent the companies from increasing crude oil prices.

(9) Neither federal price controls, first imposed in 1971, nor the federal Entitlements Program, implemented in 1974 to correct inequities among refiners using controlled-price crude oil versus exempt or imported oil, caused the alleged depressed price for the city's oil.

To prove its case at trial, the city must convince the trier of fact that the companies conspired, or at least

acted in conscious parallel, to fix and post artificially high gravity price differentials resulting in the city's receiving artificially low prices for its crude. The city has provided no direct evidence that such a conspiracy or conscious parallelism occurred. However, it has provided evidence of circumstances that point to the existence of such a conspiracy.

The record shows that the companies widely used the three-cut exchange system as an alternative to valuing barter transactions at posted prices. The companies held meetings in 1961 and 1962 to ensure that the three-cut exchange system more accurately reflected the value of the crude to the bartering parties. The record also shows that the three-cut exchange system was cumbersome and inconvenient to maintain. The city alleges that the companies used such a technically intricate system, rather than valuing the crude at posted prices, because the posted prices for heavier crudes were fixed to cheat sellers of crude. Although the parties agree that barter transactions were necessary to everyday oil operations, the city argues that the three-cut exchange system enabled the companies to value the crude bartered among themselves in a manner that avoided the rigged posted prices. The city cites the companies' efforts to maintain the three-cut exchange system as evidence that all the companies knew the posted prices were improper. The unusual effort put into the maintenance of the three-cut exchange system does constitute circumstantial evidence of conspiratorial price fixing.

When only circumstantial evidence of a conspiracy is offered, a defendant is entitled to summary judgment if it provides a plausible and justifiable alternative interpretation of its conduct that rebuts the alleged conspiracy. *T.W. Electrical Service, Inc. v. Pacific Electrical Contractors Assoc.*, 809 F.2d 626, 632 (9th Cir. 1987). For example, parallel changes in prices and exchanges of price information by competitors may be motivated by legiti-

mate business concerns. *See Wilcox*, 815 F.2d at 526-27. The companies explain, with support in the record, that the three-cut exchanges had been ongoing, the 1961-62 meetings were held to address valid technical issues only tangentially related to pricing, and the posting system itself was lawful.

The city presents evidence to rebut the companies' explanation for their conduct. The three-cut exchanges were cumbersome and inconvenient. At various times, market conditions should have caused some of the companies to post higher crude prices. Posted prices often did not correspond to market value. At least one company acknowledged that an increase in the posted price would result in increased payments to Long Beach. A question also is raised by ARCO's requirement that it be indemnified for potential liability to the city arising from use of the three-cut exchanges.

The city raises a genuine issue of material fact over whether shortages of heavy crude oil existed and should have caused an increase in posted prices. The district court incorrectly concluded that the city's evidence related only to anticipated shortages. It also erred in relying on a 1978 statement to Congress by the California Comptroller that a surplus of domestic crude existed in the region. The statement is largely irrelevant to this suit because it was made after the July 1977 entry of Alaska North Slope oil into the California market.

The district court found that the city's analysis of marginal refinery values had no significance. Although the questions raised by the district court would be valid cross-examination, the refinery value analysis is relevant, material evidence. It would assist the trier of fact in the search for truth, Fed. R. Evid. 702, and its probative value is not outweighed by the danger of misleading the jury, Fed. R. Evid. 403. Given the companies' dominance of the market, the analysis is critical in proving damages. *See Shad v. Dean Witter Reynolds, Inc.*, 799 F.2d 525,

529-30 (9th Cir. 1986) (finding introduction of expert opinion essential); *compare McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 806-807 (9th Cir. 1988) (finding expert opinion properly excluded because based on unsupported assumptions and flawed analysis).

Under the doctrine of conscious parallelism, an agreement may be inferred if each participant knew that concerted action was contemplated and invited, gave its adherence to and participated in the scheme, and understood that cooperation was essential to the plan, *Barry v. Blue Cross of California*, 805 F.2d 866, 869 (9th Cir. 1986) (citing *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226 (1939)). The record shows that the companies were aware of the disparity between posted prices and three-cut exchange values and of the disparity between the posted prices and refining values for heavy crude oils. Each knew that the participation of all the companies was necessary to make the plan work, and, with the exception of Exxon, actively participated in the meetings to maintain the utility of the three-cut exchanges. Each engaged in three-cut exchanges. Because the companies dominated the relevant market, each understood the necessity of cooperation. *See Barry*, 805 F.2d at 869 (knowledge that cooperation is essential shown by oligopolistic market structure); *see also* Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach*, 21 Stan. L. Rev. 1562, 1575-1587 (1969) (viewing noncompetitive pricing by oligopolists as collusive and § 1 of Sherman Act as appropriate remedy).

Additionally, the district court recognized that four of the six companies—Chevron, Union, Mobil, and Shell—had substantial incentives to conspire. The district court disregarded the city's explanation of the incentives to conspire, such as access to pipelines and long term refining plans, for Texaco and Exxon. The record shows that the companies all recognized that artificially maintaining lower posted prices was in their best interests.

Whether this evidence will support at least an inference of an agreement among the companies is a question for the trier of fact.

Genuine issues of material fact exist over the effect of the Mandatory Oil Import Program on oil prices from 1959-1973. The program's primary purpose was to promote national security by encouraging domestic oil production. Presidential Proclamation No. 3279, 3 C.F.R. 11 (1959-63 Comp.); *see Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548, 552 (1976). The companies argue that crude prices were low because the import program also sought to stabilize domestic crude oil prices. The record contains significant, persuasive evidence that the import program was not intended to prevent crude oil prices from rising and would have allowed the price for the city's oil to increase.

Genuine issues of material fact exist with regard to the Entitlements Program. The program aimed to increase the cost to refiners of controlled oil, such as the city's, to roughly equal the cost of uncontrolled oil. Long Beach has shown that the controlled price for the city's oil may have been greater in the absence of the conspiracy. Therefore, the program does not excuse the companies from potential antitrust liability. However, we recognize that the existence of the Entitlements Program may affect potential damages significantly.

The city has raised genuine issues of material fact. It has presented significant evidence of an antitrust conspiracy that tends to exclude the possibility of independent action. An inference of collusive action reasonably and plausibly may be made based on the evidence presented. Unlike *Matsushita*, this is not a case of legitimate price competition or an implausible predatory pricing scheme. *Cf.* 475 U.S. at 588-595. A trier of fact must evaluate the substantial evidence in the record in support of the city's antitrust claim.

C. Price Controls and Legal Injury

The district court barred the Long Beach claims because during all but a few months of the damage period, it found that federal price control programs, and not the companies' actions, were the legal cause of the alleged injury—underpriced crude oil. Because Long Beach had no right to receive prices greater than the federal ceiling price for its oil, the court found that it had suffered no legal injury and therefore had no claim for relief.

Long Beach argues that the companies conspired to set an artificially low price for crude oil, and in the absence of that conspiracy, the price controls imposed by the federal government after the conspiracy began would have had a higher ceiling. The companies respond that the crude oil prices were limited by the federal government with full knowledge of the allegation that they were too low, and therefore the federal government, and not the companies, was the "supervening" legal cause of any injury suffered by Long Beach. The companies make the ambitious claim that, as a matter of law, they should be shielded from antitrust liability because the low prices of which Long Beach complains were set by a government agency.

The district court made detailed findings of fact on the relationship between the price control program and the companies' prices for crude oil. The court found that price control administrators had rejected, at several points beginning on April 12, 1972, the arguments of California producers that crude oil prices were too low. The court concluded that even if Long Beach could prove a price-fixing conspiracy, as a result of the actions of federal price control administrators from April 12, 1972, until October 1, 1976, Long Beach had no right to any damages. The court reasoned that the city suffered no legal injury because the companies paid the city all that the law allowed, and therefore should not be liable for

any additional amounts. We understand but reject the argument.

The establishment of price celings by the federal government, after the alleged conspiracy began, does not in itself mean that the companies' conduct could not have caused the injuries. If unlawful underpricing did occur, the harmful effects continued. If historical prices had been higher, the ceiling prices might have been higher "but for" the alleged conspiracy. *See Woods Exploration and Production Co. v. Aluminum Co. of America*, 438 F.2d 1286, 1292-98 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972). *Woods* was a federal antitrust action in which the plaintiffs charged that the defendants filed false natural gas production forecasts with the Texas Railroad Commission in order to reduce the production allowances for the plaintiffs. The district court granted partial summary judgment for the defendants on the ground that the plaintiffs were not entitled to recover damages, because the Texas Railroad Commission, and not the defendants, set the allowances. The Fifth Circuit reversed and remanded for trial, stating that because the Commission's actions were based on false information, liability existed. *Id.* at 1295-98; *see also City of New Orleans v. United Gas Pipe Line Co.*, 517 So. 2d 145, 156 (La. App. 1987), *cert. denied*, 109 S. Ct. —— (1988) (holding delivery obligations under gas contract not superceded by federal orders because company's earlier failures to obtain supplies caused problem). In this case, if the price ceilings were based on prices set artifically low as a result of an unlawful conspiracy, liability should still exist.

The companies incorrectly characterize the price control program as a supervening or superceding cause of the injury to the city. The city does not argue that the companies conspired to influence the price control program or that the price control program was the cause of its injury. *Cf. United Mine Workers v. Pennington*, 381 U.S. 657,

670-71 (1965) (no antitrust liability for joint efforts to influence government officials or for injuries resulting from related action by government official); *Okenfenokee Rural Electric Membership Corp. v. Florida Power & Light Co.*, 214 F.2d 413, 418 (5th Cir. 1954) (no antitrust liability for injuries resulting from valid government action denying construction permit). Mere ratification by government officials does not absolve an otherwise illegal conspiracy. *See Woods*, 438 F.2d at 1298. If Long Beach can persuade a fact-finder that the price of crude oil would have been set at a different level but for the allegedly illegal agreement, it is entitled to damages. It overcomes summary judgment in presenting sufficient evidence to raise a genuine issue of material fact as to whether price controls would have been set at a different level in the absence of the alleged conspiracy.

A related question is whether the setting of price ceilings under the authority of the Economic Stabilization Act effectively should shelter the companies from antitrust liability for conduct not specifically approved by the act. *See Petroleum Products Antitrust Litigation*, 830 F.2d 198, 201 (Em. App.), *cert. denied*, 108 S. Ct. 466 (1987). In other words, does federal price regulation displace private antitrust regulation? If a substantive, comprehensive regulatory scheme exists, the Court has found that the private damages provisions of the antitrust laws are not an available remedy. *See Square D Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409, 422 (1986) (citing *Keogh v. Chicago and N.W. Ry. Co.*, 260 U.S. 156 (1922)).

The district court's analysis implies that during a period of price controls, antitrust claims involving conspiracies to underprice, such as predatory pricing or the alleged agreement in this case, may not be pursued in the courts. For a regulatory program, such as price controls, to displace an antitrust claim the relief desired must be available from the regulatory agency. *Barnes v. Arden*

Mayfair, Inc., 759 F.2d 676, 679, (9th Cir. 1985) (citing *Keogh*). An exemption will be implied if necessary to give the regulatory statute full effect. *Barnes*, 759 F.2d at 679; *Foremost International Tours v. Quantas Airways Ltd.*, 525 F.2d 281, 284 (9th Cir. 1975), *cert. denied*, 429 U.S. 816 (1976); *see* Areeda & Turner, *Antitrust Law*, ¶ 224 (1978). Unless the conflict between the regulatory decision and antitrust liability is obvious, as with comprehensive ICC regulation of railroad rates and practices, the Court will not find an implied repeal of the antitrust laws. *See* Von Kalinowski, *Antitrust Laws & Trade Regulation* § 44A.02[2] (1988). If the challenged activity is beyond the scope of the regulatory body, no exemption will be found. *Barnes*, 759 F.2d at 679.

Implied repeals of the antitrust statutes are disfavored, and require a convincing showing that the antitrust laws and the regulatory program cannot coexist. *National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City*, 452 U.S. 378, 388-89 (1981). Long Beach points to substantial administrative and legislative history that tends to show that the price control statutes were not intended to supplant the antitrust statutes. Additionally, the 1973 Emergency Petroleum Allocation Act, which continued price controls on crude oil, contained a provision prohibiting any construction of its provisions that would create any defenses to antitrust actions. Pub. L. No. 93-159, § 6 (1973), 15 U.S.C. § 755(c) (provision effective from 1973-1975, repealed by § 453, Energy Policy and Conservation Act, Pub. L. No. 94-163 (1975)); *see Typhoon Car Wash, Inc. v. Mobil Oil Corp.*, 770 F.2d 1085, 1089-90 (Em. App.), *cert. denied*, 474 U.S. 981 (1985).

The price ceilings set by the government were based on prices in effect at the time controls were imposed. The price control administrators did not examine the antitrust claims of the city. No independent analysis, comparable to the rate-making in *Keogh*, was performed.

Without such an independent analysis, the government's actions do not immunize the companies from civil antitrust liability. *See Foremost International Tours*, 525 F.2d at 285-87; Areeda, *supra*, at ¶¶ 224, 225. The existence of price controls will affect the determination of potential damages but does not absolve the companies of antitrust liability.

CONCLUSION

Long Beach presented sufficient evidence to raise genuine issues of material fact in support of its conspiracy claims, and to overcome the defenses that the Mandatory Oil Import Program, the Entitlements Program, or federal price controls were the cause of the alleged depressed price for its crude oil.[5]

REVERSED and REMANDED for trial.

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[5] In *Petroleum Products Antitrust Litigation*, 830 F.2d 198 (Em. App.), *cert. denied*, 108 S. Ct. 466 (1987), the Temporary Emergency Court of Appeals considered an interlocutory appeal by the city of the partial summary judgment dismissing the antitrust claims beginning April 12, 1972, because of the effect of federal price controls. TECA ruled that the issues raised were nonjusticiable until the underlying antitrust liability was resolved. *Id.* at 203. TECA noted that two issues were potentially within its sphere of authority, and could be appealed to it if and when justiciable:

> A. Whether or not 6 C.F.R. Sec. 101.34(a)(2), which exempted state and local governments from price controls under certain circumstances, applied to sales of "net profits oil" by appellants during the periods April 12, 1972 to June 13, 1973, and August 19, 1973 to October 25, 1973?
>
> . . .
>
> C. Whether or not compliance with Phase III price controls was "voluntary" during the period of January 11, 1973 to June 13, 1973 so that appellees were not prohibited from making appropriate price adjustments for the crude oil sold by appellants during this period?

Id. at 200, 203. We did not consider the above issues, and express no opinion on the appropriate time for the parties to raise them with TECA.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 86-5859
DC Nos. CV-75-2232-WPG, CV-76-2839

CITY OF LONG BEACH, as trustee for the State of California,
Plaintiff-Appellant,

v.

STANDARD OIL COMPANY OF CALIFORNIA; TEXACO, INCORPORATED; EXXON CORPORATION; UNION OIL COMPANY OF CALIFORNIA; MOBIL OIL CORPORATION; SHELL OIL COMPANY, *Defendants-Appellees.*

STATE OF CALIFORNIA, on behalf of itself and all political subdivisions and special districts within the state similarly situated, *Plaintiff-Appellant,*

v.

STANDARD OIL CO., *et al.*,
Defendants-Appellees.

No. 86-5860
D.C. No. CV-82-3252-WPG

CITY OF LONG BEACH,
Plaintiff-Appellant,

v.

STANDARD OIL CO., *et al.*,
Defendants-Appellees.

IN RE: COORDINATED PRETRIAL PROCEEDING IN PETROLEUM PRODUCTS ANTITRUST LITIGATION—MDL 150.

Nos. 87-6300/6629
D.C. No. CV-86-1771-WPG

PEOPLE OF THE STATE OF CALIFORNIA; CITY OF LONG BEACH, as Trustee for the State of California, and the State of California as Beneficiary,
Plaintiffs-Appellants,

v.

CHEVRON CORPORATION; UNOCAL CORPORATION; MOBIL OIL CORPORATION; SHELL OIL COMPANY; SHELL CALIFORNIA PRODUCTION, INC.; EXXON CORPORATION; EXXON COMPANY, USA; TEXACO, INC.,
Defendants-Appellees.

IN RE: COORDINATED PRETRIAL PROCEEDINGS IN THE PETROLEUM PRODUCTS ANTITRUST LITIGATION

Nos. 87-6301/6628
D.C. No. CV-75-2232-WPG

CITY OF LONG BEACH, as trustee for the State of California, and the State of California as beneficiary,
Plaintiff-Appellant,

v.

STANDARD OIL COMPANY OF CALIFORNIA, *et al.*,
Defendants-Appellees.

ORDER

Filed September 22, 1989

Before: SCHROEDER, FARRIS, and POOLE, Circuit Judges.

The opinion filed April 17, 1989 in 86-5859/5860, Long Beach v. Standard Oil, is amended by striking the following language at page 3934 of the slip opinion, second full

paragraph, lines 5-7: "Unlike Matsushita, this is not a case of legitimate price competition or an implausible predatory pricing scheme. Cf. 475 U.S. at 588-595," and substituting therefor, "See Matsushita, 475 U.S. at 588-595." With this amendment, the panel has voted to deny appellants' petitions for rehearing and to reject the suggestions for rehearing en banc.

The full court was advised of the amendment to the opinion and the suggestions for rehearing en banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of an en banc consideration. (Fed. R. App. P. 35.)

The opinion in 86-5859/5860 is amended as set forth above, the petitions for rehearing are denied and the suggestions for rehearing en banc are rejected.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MDL Docket No. 150
LONG BEACH
CV 75-2232-WPG

IN RE: COORDINATED PRETRIAL PROCEEDINGS
IN THE PETROLEUM PRODUCTS
ANTITRUST LITIGATION

MEMORANDUM OF DECISION GRANTING DEFENDANTS' SUMMARY JUDGMENT MOTIONS REGARDING ANTITRUST CLAIMS

[Filed Sept. 19, 1985]

The respective defendants,* individually and collectively, have filed motions for summary judgment that would deny any and all recovery to the plaintiffs growing out of their allegations of conspiracy to depress the prices of crude oil paid by the defendants to the plaintiffs. The motions and the plaintiffs' opposition have been thoroughly briefed and documented. Comprehensive oral arguments were heard on April 1-4 and April 8-11, 1985, and the matters were taken under submission. On June 19, 1985, this court filed a Judgment granting such motions. The bases for such summary judgment are contained in this Memorandum.

Governmental Action Precludes Recovery. The period of alleged liability runs from June 27, 1971, the earliest

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* The defendants are Exxon Corporation, Mobil Oil Corporation, Shell Oil Company, Standard Oil Company of California, Texaco, Inc., and Union Oil Company of California.

date allowed by the statute of limitations, and extends through 1977, the end of the damage period. This court previously has ruled that federal price controls preclude recovery during the entire period between April 12, 1972, and October 1, 1976. The plaintiffs' claims also were ordered dismissed for the remainder of the damage period, to the extent that the claimed appropriate competitive prices exceeded the increased price ceiling. (Memorandum of Decision filed July 17, 1984.) This court also has ruled previously that the Entitlements Program of the Federal Government prevents any recovery of damages attributable to the alleged reduced prices paid by the defendants for lower-tier controlled oil from November 1, 1974, to the end of the damage period. (Memorandum of Decision and Partial Summary Judgment filed December 13, 1984.)

Thus, only the early part of the period of alleged liability, the time between June 27, 1971, and April 12, 1972, is not covered by one or both of the earlier decisions. The court now concludes that recovery of damages allocable to such period is precluded by the presence and administration of the Government's Mandatory Oil Import Program (MOIP).

An Effective Purpose Of The MOIP Was To Prevent The Crude Oil Price Increases That The Plaintiffs Claim Should Have Occurred. The rapid development of Middle East crude oil production following World War II prompted a concern in the United States Government that relatively cheap imports of foreign oil might reduce domestic exploration and development activity. Accordingly, the Eisenhower administration created, on March 10, 1959, the MOIP program, which had as a goal the protection of national security by imposing mandatory limits upon the importation of foreign oil. (Presidential Proclamation No. 3279) The program had the further goal of making certain that domestic oil companies did

not take advantage of this protection against foreign oil by increasing their own prices. Successive national administrations used MOIP, from its inception until late 1973, to achieve and maintain this balance between national security and price stability. As Secretary of the Interior Udall, who was then the administrator of the program, said in 1965, "[i]n District V, the West Coast, the Secretary of the Interior has ample authority now to increase import levels at any time. This authority is adequate to prevent any significant price increases in the West Coast marketing region" (Memorandum from Stewart Udall to Joseph Califano, Assistant to President Johnson, Exhibit 51 of Atlantic Richfield submission concerning MOIP). The record submitted by the defendants is replete with similar statements made by responsible members of the Johnson and Nixon administrations asserting their authority and their willingness to use MOIP to stabilize domestic crude oil prices at existing levels. For example, Paul W. McCracken, Chairman of the Council of Economic Advisors under the Nixon Administration (in an affidavit submitted by Atlantic Richfield at paragraph 12), assessed operations during his tenure as follows:

> "The central purpose of the MOIP was to maintain domestic crude oil prices at their existing level above the world market price in order to provide for sufficient exploration, development and production of domestic crude oil to avoid any undue dependence upon foreign oil supplies that might threaten the nation's national security. At the same time, the federal government did not intend to permit any increase in domestic crude oil prices, which would increase the MOIP's cost to consumers by enlarging the spread between domestic crude oil prices and world prices . . . . To achieve its objective of protecting the national security while avoiding price increases that would increase the cost of import controls to consumers, the Administration sought in

its administration of the import program to stabilize domestic crude oil prices at existing levels."

During the period of MOIP, as shown in a speech made on September 23, 1968, by a vice president of Union Oil Company, the defendants were aware that the Oil Imports Administration was in position to maintain a supply/demand balance "by filling the gap with foreign crude." The result was that ". . . District V could be long on crude oil but can never be short, because of the foreign imports. The end result, then, is that there is no demand incentive to raise domestic crude prices." (Exhibit 28, Joint Reply by Defendants Regarding MOIP.)

The independent oil producers were aware that the Government, through its control of oil importation, was effective in keeping down the prices of crude oil. (Deposition of Glenn Ferguson, former president of the Independent Oil and Gas Producers of California, pages 323-324.) In 1975, Kenneth Cory, the chairman of the California State Lands Commission, stated that under the oil import control program "there was essentially a negative pressure from import controls on domestic crude prices . . . ." (Statement before a Federal Energy Administration hearing on heavy California crude oil differential, August 5, 1975.)

Quota levels for oil imports were based upon estimates by the Bureau of Mines as to domestic oil production and demand. There are indications from governmental levels as high as that of President Johnson that demand was estimated somewhat liberally in order to make certain that crude oil prices remained stable.

The plaintiffs undertake to reduce the effect of the foregoing to a triable issue by submitting contradictory statements of four people. However, Secretary Udall specifically renounced or otherwise explained his comments to which the plaintiffs refer and he described the circumstances under which they were made. Alas, such comments are completely inconsistent with the many

other official statements by the Secretary that this record contains. An example of Secretary Udall's assessment of MOIP is revealed in his deposition in which he testified that the Interior Department's authority to estimate the gap between demand and domestic production enabled the Government "effectively to control price increases." Deposition of Stewart Udall, page 52. He also asserted that with MOIP, "you didn't have a free market situation. It was a controlled market. And the government was sitting there doing the controlling." *Id.*, page 25.

Likewise, a remark made by Assistant Secretary of the Interior Cordell Moore was given a strained interpretation by the plaintiffs and was explained by Mr. Moore to harmonize with his many other assertions about how MOIP operated to keep crude oil prices stabilized. For example, in his deposition, he testified that the Interior Department had been trying, through MOIP, to fill the supply/demand gap and thta such effort worked remarkably well "in stabilizing domestic crude oil prices in PAD V." (Deposition of J. Cordell Moore, pages 39-40.)

The other two individuals upon whose testimony the plaintiffs rely are John O'Leary, an Interior Department staff member, and T. M. Powell, vice president of Standard Oil Company in charge of supply. Both of these gentlemen testified to a lack of awareness that MOIP operated or was effective in the manner that the defendants ascribed to it. Each of these men held positions that might be expected to have had some involvement in such matters, although this is by no means certain. In any event, in the face of all of the evidence in confirmation of MOIP's affirmative function, I find it intolerable that the lack of recollection or of participation by two individuals should be the basis for requiring a trial on this issue.

The plaintiffs contend that the defendants' claims concerning the effectiveness of MOIP in keeping west coast

crude oil prices stable totally ignore the gravity differential issue. However, the principal thrust of the plaintiffs' action is that the defendants did not pay Long Beach enough for its crude oil. Any adjustments in the gravity differential without increases in the average price of all crude would have been of no value to the plaintiffs. The function of MOIP was to keep overall crude prices from substantially increasing, irrespective of the gravity differentials.

Section 6(a) of the Proclamation establishing MOIP directed a Government agency to determine whether increases in crude oil prices were "necessary to accomplish . . . national security objectives . . . ." The Government used its authority under § 6(a) to impress upon the oil companies that any increases in crude oil prices might be met with increases in oil imports. McCracken Affidavit, paragraph 16. President Johnson's Chairman of the Council of Economic Advisers, Gardner Ackley, "demand[ed] that we [the Interior Department] control prices and use whatever tools that we had available to us, and do whatever jawboning we could do to keep petroleum prices steady." Deposition of Stewart Udall, page 50.

The plaintiffs assert that "[t]he defendants' reliance on government jawboning is seriously misplaced—price increases for crude oil continue to occur throughout the period in PADD's I-IV, the only section of the country in which the government attempted to use jawboning re MOIP." (Common Issues Brief, page 364.) The plaintiffs then list several miscellaneous price increases that they attribute to some of the defendants and others in mid-western United States in 1966 and 1967. The record shows that the threat of allowing foreign imports of crude oil was less effective in PADs I-IV than in PAD V, due to the cost of transportation from the west coast. Thus, jawboning was about the only "tool" that the MOIP administrators had in areas other than the west coast. The effectiveness or lack of effectiveness of MOIP

in PADs I-IV is hardly a measure of MOIP's ability to hold down prices in PAD V where the increase of foreign imports could make a substantial difference.

In any event, I find it difficult to accept the argument that the defendants should have ignored completely the Government's jawboning and that they should now be liable in treble damages to the extent that they did not defy the Government's attempt to hold down domestic crude oil prices.

In light of the foregoing, I find that any failure by the defendants to increase the prices that they paid Long Beach for its crude oil during the period of MOIP was due to the effectiveness of that program and not attributable to any conspiracy.

The foregoing is believed to provide a mandate for summary judgment for the defendants on the antitrust issues. However, in consideration of the possibility that higher authority might disagree, I shall devote the remainder of this memorandum to a discussion of my alternative reason for granting summary judgment: After more than eight years of discovery, the plaintiffs simply do not have the evidence to prove the antitrust conspiracy that they allege.

The Alleged Conspiracy. The plaintiffs charge the six present defendants (and former defendant Atlantic Richfield) with a conspiracy "to fix the prices they paid to plaintiffs and other producers for California crude oil at levels far below those that would have prevailed in a competitive market." (Page 5, Plaintiffs' Common Issues Brief.)

At the times concerned in this action, purchases of oil from the Wilmington Oil Field (and other oil fields in California) were made on the basis of "posted prices," which were published assertions by major purchasers as to the prices that they were willing to pay for the various grades of crude oil. The principal posters in the

Wilmington Oil Field were defendants Arco, Mobil, Socal and Union.

Lighter crude oil is more conducive to being refined into gasoline than is heavier crude oil, which normally is converted into fuel oil or other relatively less expensive products. The posted prices regularly decreased at the rate of about five cents per degree of API gravity. Thus, for example, a poster offered to pay for 18° API gravity crude oil about five cents less per barrel than for 19° API gravity crude oil. The plaintiffs contend that this "gravity differential" was much too great and that the defendants knew it. Accordingly, say the plaintiffs, representatives of the defendants held five meetings during 1961 and 1962. These meetings resulted in a conspiratorial agreement under which the defendants would continue to purchase heavy crude oil from the plaintiffs at the artificially low posted prices that were based upon the artificially high gravity differential. They then would exchange such oil among themselves at its true value. According to the plaintiffs, such true value reflected a gravity differential of only about two cents per degree API, resulting in "underpayments" to the plaintiffs averaging 91 cents per barrel and totaling hundreds of millions of dollars.

The defendants acknowledge that the five meetings were held, but they contend that the purpose and accomplishments of such meetings were to revise and up-date a standardized method of defining the various grades of crude oil that the defendants necessarily exchanged among themselves through their respective pipeline systems. (These meetings and the "3-cut exchange" program that resulted will be discussed later in this memorandum.) The defendants deny that they in any manner conspired at the meetings, or otherwise, with respect to prices that they would pay to Long Beach for its crude oil.

The plaintiffs have no direct evidence of such a conspiracy, but they have established that, during a period

of about twenty years, including the times here concerned, the defendants posted, or otherwise offered to pay, substantially identical prices for the plaintiffs' crude oil. Such "[p]arallel business behaviour or 'conscious parallelism' is the type of circumstantial evidence which, absent more direct evidence, will be relied on in inferring unlawful agreement." *Weit v. Continental Illinois National Bank & Trust Co.*, 641 F.2d 457, 462 (7th Cir. 1981). However, as is noted above, the defendants vigorously deny any conspiracy and insist that the prices that they paid stemmed entirely from their individual and independent decisions. In the face of such denials, the plaintiffs "must come forward with some significant probative evidence which suggests that conscious parallelism is the result of an unlawful agreement [citing cases]. Parallel behaviour and the hope that something further can be developed at trial is not sufficient to warrant a trial on the merits." *Weit v. Continental Illinois National Bank & Trust Co.*, 641 F.2d at 462. The plaintiffs acknowledge this burden and contend that they will fulfill it by establishing several "plus factors" that will show that the conscious parallelism is the result of an unlawful agreement. We now discuss each of the "plus factors" and show how it is that they do not sustain the plaintiffs' position.

1. *The Alleged Underpricing and Distorted Gravity Differentials.* The plaintiffs contend that the uniform prices that the defendants paid for heavy crude oil were much too low, due to the five cent gravity differential, as opposed to a proper differential of about two cents. As is mentioned above, lighter crude oil normally is easier to convert into gasoline than is heavier crude oil, from which are produced fuel oil and other less expensive products. These circumstances make the heavier oil of relatively less value to a refiner and account for the gravity differential for each degree of reduction in specific gravity.

In the course of the years here concerned, the various defendants, at one time or another, installed expensive refining equipment that has greatly increased the proportionate amounts of gasoline and other highly refined products that can be derived from the heavier crude oil. Thus, the values of the heavier crudes to the refiners that have this equipment has become substantially greater in relation to the lighter crudes and as compared to refiners that have not made such installations.

In support of their contention of underpricing, the plaintiffs present several "in house" memoranda by various employees of the defendants, which refer to the heavier crudes as being priced too low in relation to the lighter crudes, and suggesting that it would be in their respective companies' interests to exchange light crude oil at posted prices in return for heavy. However, most of these documents were prepared by personnel of companies that had installed the more efficient refining equipment and for whom the heavier crude therefore had a higher refining value than the posted price gravity differential would reflect. These documents, and other comments and testimony that talk of underpriced heavy crude oil, appear to be referring to the value of such oil to a particular refiner rather than its market value.

On the other hand, the defendants have submitted documents containing comments by others who expressed the view that a five cent gravity differential was by no means too large when the capital cost of the expensive sophisticated refining equipment is taken into account, or when considered from the standpoint of a marginal refiner who does not have such equipment.

In any event, it seems to me that subjective opinions of individuals as to whether the price of heavy crude oil was too low or too high are of little relevance here. Unless there was a shortage of heavy crude oil, the price would have been set by the marginal refiners, and there

was no reason for any of the defendants to have paid higher prices just because the oil was more valuable to them than was the money that they were obliged to pay for it.

If there had been a shortage of heavy crude oil during the relevant period, it is to be expected that prices would have increased as the substantial refiners competed for the limited quantities of oil available, and the more marginal refiners would have fallen by the wayside. The failure of prices to increase in the face of such short supply would, indeed, be a plus factor suggesting collusion. The record shows that for a period of about a year beginning in July 1970 a shortage of crude oil occurred when production was cut back in Libya and a pipeline across Syria was closed, with a resulting decrease of tanker imports from the Middle East. In the fall of 1973 there also was a shortage due to the Arab embargo. Except for these two relatively brief periods, there was no substantial shortage of crude oil available to California refiners during the 1960s and 1970s. Throughout this period, according to the plaintiffs' experts, "small, relatively inefficient refiners continued to process heavy crude oils." *See Putnam Hayes & Bartlett, Inc.*, An Analysis Of Crude Oil Pricing In California, July 1982, page 20. Similarly, Mr. Kenneth Cory, the Comptroller of the State of California, asserted to the Economic Regulatory Administration, Department of Energy, in 1978 that California crude oil, "as a whole, is predominantly heavy. We have more domestic crude oil in the District than our refineries are currently equipped to handle." The plaintiffs, nonetheless, have presented documents upon which they rely to support their contention that there was a shortage of oil during the relevant period. However, such documents were referring to *anticipated* inadequacies of *domestic* crude supply to a particular refinery. In some instances, the expected shortage did not materialize; in others, it was overcome by the importation of foreign crude oil.

Authoritative representatives of the defendants have testified in deposition or declaration that their respective companies had no difficulty in acquiring, at posted prices, all of the crude oil that their refineries could utilize. The massive record compiled in this case discloses no substantial indication to the contrary.

The plaintiffs have made a further forceful argument from which they infer that there must have been collusion among the defendants in keeping posted prices at low levels. Such argument is under the heading of *marginal refinery values.* The argument begins by stating some valid economic propositions: (a) A marginal refinery value normally reflects the dollar value of the products that could be obtained by adding an additional barrel of a particular crude oil for processing in the refinery, less the additional refining cost attributable to that barrel; (b) a refining margin is the difference between the refining value of the barrel of oil and the cost of acquiring such barrel; and (c) in a competitive market, a refiner, in order to maximize his profits, would keep on buying crude oil until the price of such oil would be substantially equal to its marginal refining value, i.e., the refining margin would be about zero.

The plaintiffs then point to studies made by their experts that show some 18,000 instances in which calculations made by defendants' personnel have revealed marginal refining values that were substantially greater than the costs of the corresponding crude oil purchased. The average refining margin was about 91 cents. The plaintiffs contend that this shows that if the defendants had been acting competitively, they would have gone out and purchased more heavy crude oil until the prices of acquiring it equaled the marginal refining values. By doing so, they could have increased their profits, and their failure to do so is indicative of collusion in order to hold down the prices of heavy crude oil, of which they were substantial net buyers.

I have a lot of trouble with this rather simplistic proposition. It presumably would have considerable merit in a perfect economy. But, in the 1960s and 1970s there were many factors that a refiner would have had to take into consideration before responding to a marginal refinery value study by undertaking to acquire more oil for processing and by increasing the prices that he would pay in order to do so:

a. What was the purpose of the marginal refinery value study? Some of the 18,000 of such studies were directed only to assessing the desirability of entering into a transaction involving a relatively small quantity of oil and would have no relevance to a general increase in acquisition and refining.

b. If the study undertook to assess an overall marginal refining value, did it assume the refinery to have an open capacity? Refining values calculated with open capacity are greater than refining values calculated on the assumption of operations at full capacity.

c. If the refinery is operating at substantially full capacity (as generally appears to have been the situation), do present and foreseeable prospects warrant substantial expansion of the refinery? Refineries are not efficiently built in small increments.

d. What would be the cost of an expansion otherwise deemed appropriate, and how could it be capitalized and financed?

e. Will the product prices upon which the marginal refinery value study was based remain constant? How substantial is the possibility that the product prices might decline as production increases?

f. Many of the defendants' contracts for the purchase of crude oil (including the Contractors' Agreement with the City of Long Beach) contain a "favored nation" provision, under which an increase in prices paid for crude

oil to one seller would automatically trigger a similar and retroactive increase in the prices paid to others. Under such circumstances, an attempt to acquire a relatively small additional amount of crude oil at a higher price would substantially increase a marginal cost curve.

g. The record shows that the defendants were concerned about the reaction of the United States Government, in its Mandatory Oil Import Program (MOIP), in response to any increase in crude oil prices. If the defendants upped their posted prices, what would be the risk of a relaxation of the restrictions upon imports of crude oil, or even the abolition of the MOIP Program? In this respect, the interrelationships among MOIP, the Entitlements Program and the costs of domestic crude oil were matters for careful consideration in determining whether or not to buy more of such oil at increased prices.

It is evident from the foregoing (and probably from additional factors that have not occurred to me) that the significance of any marginal refinery value study, and the extent to which action should be taken on the strength of it, were matters for the careful business judgment of the refiner. (This assumes that price controls did not arbitrarily affect such judgment.) I do not see how any court, or any reasonable jury, could conclude from the 18,000 marginal refinery value studies that the defendants should have purchased more crude oil than they did. It is even more obvious that no inference of collusion may be drawn from their failure to have done so.

2. *Incentive To Conspire.* The second plus factor asserted by the plaintiffs is the defendants' alleged incentive to conspire. The argument is made that the defendants were net purchasers of crude oil and that "[i]f heavy crude prices rose, . . . the defendants would be hurt. They had an incentive to ensure that competition did not break out in this marketplace because if competi-

tion broke out in this marketplace heavy crude prices would rise, and that would be against their economic incentives." Transcript, page 662. In 1961 and 1962 when the alleged conspiracy took place, it was not in the economic interests of *all* of the defendants to keep down the prices of crude oil, and for all of them to have joined in a conspiracy with such a goal would be quite surprising.

a. *Exxon* was strictly a producer and seller of crude oil in California until its refinery at Benicia was completed in 1969. It sold large quantities of oil at posted prices, and if such prices had been too low, Exxon would have lost several millions of dollars. By the time the Benicia refinery came on stream, Exxon anticipated that by 1972 it would be receiving about 300,000 barrels per day from its new discoveries in Prudhoe Bay in Alaska and between 50,000 and 100,000 barrels per day from the newly discovered Hondo field in the Santa Barbara Channel. With these discoveries, Exxon continued to be a net seller of crude oil in California and thus continued to be interested in higher prices. The plaintiffs never have advanced a satisfactory explanation as to how any conspiracy to keep crude oil prices low logically would have included Exxon.

b. The plaintiffs and their experts acknowledge that *Texaco* would not have been adversely affected by increases in crude oil prices in California during the relevant period. See Plaintiffs' Trial Brief, Section 3.3 and National Economic Research Associates Inc., Pricing Of California Crude Oil And Payments To The City Of Long Beach, March 1982, page 263. Certainly, Texaco would not have been one of the defendants that "would be hurt . . . if competition broke out in this marketplace."

c. *Mobil*, *Socal*, *Shell*, *Union* and *Arco* were substantial producers of crude oil. However, they were, in varying extents, net purchasers. They acknowledge that they

would have been willing to pay more for crude oil if they could have passed such increases into their product markets. But in the 1960s and early 1970s the petroleum product markets remained low, and it follows that those companies did have an incentive to keep crude prices as far down as practicable. However, as mentioned above, the record indicates that the respective defendants were able to obtain, at posted prices, all of the crude oil that they needed for their refineries. This fact tends to reduce the "plus factor" strength of any incentive to conspire to keep crude prices from rising, as does the absence of any apparent reason for Exxon and Texaco to have wanted to join such a conspiracy. In the absence of any common motivation, there are no grounds for inferring a conspiracy. *Zoslaw v. MCA Distributing Corp.*, 693 F.2d 870, 885 (9th Cir. 1982).

3. *Unbending Adherence To Identical Posted Prices.* Another plus factor, according to the plaintiffs, is the refusal of all defendants to deviate from the identical prices posted by Arco, Mobil, Socal and Union. The record shows that these companies did adhere consistently to the prices that they posted and refused to deviate from them or to pay bonuses over and above them. Texaco discontinued posting prices in California in 1962, and Exxon and Shell never did post prices in this state. All three of these defendants regularly made their purchases of crude oil in accordance with the prices posted by the others.

> "Parallel business behavior or 'conscious parallelism' is the type of circumstantial evidence which, absent more direct evidence, will be relied on in inferring unlawful agreement. *Theatre Enterprises v. Paramount Film Distributing Corp.*, 346 U.S. 537, 540, 74 S.Ct. 257, 259, 98 L.Ed. 273 (1954). However, when defendants come forward with denials sufficient to shift the burden under Rule 56(e), plaintiffs must come forward with some significant probative

evidence which suggests that conscious parallelism is the result of an unlawful agreement."

Weit v. Continental Illinois National Bank and Trust Company of Chicago, et al., 641 F.2d 457, 462 (7th Cir. 1981).

The plaintiffs insist that this uniformity in pricing is sinister because at the times of such refusals to pay more the defendants were desperately short of oil. If such had been the case, it is to be expected that a refiner in a competitive market would have bid or posted higher in order to get the oil that it needed. However, as noted before, except in 1970 and 1973 there were no sustained shortages of both foreign and domestic crude oil, and the defendants did not need to pay more in order to fulfill their requirements.

The posting companies contend that they maintained and adhered to their posted schedules in order to assure their many suppliers and prospective suppliers that all were being treated equally. Rather than increase or decrease their posted prices to accommodate transitory changes in their requirements, the respective defendants posted prices that generally reflected the lowest costs at which they believed that they could acquire all of the crude oil that they would need on a relatively long term basis. In making this determination, it was important to consider what other refiners were posting or paying. A refiner could not afford to pay more for crude oil than its competitors paid and remain competitive in the product market. On the other hand, a refiner could not afford to reduce its prices below those of its competitors, lest its suppliers exercise their rights to cancel their contracts upon the lowering of posted prices.

The fact that posted prices were relied upon in determining royalty payments, depletion allowances and inventory costs further tended to discourage transitory changes in such postings. Also, as is discussed earlier

in this memorandum, there was the concern as to what action the Government might take under its MOIP Program if crude oil prices were to increase substantially.

Despite all of the foregoing considerations, posted prices did not remain completely constant. Socal announced a five percent increase for all California crudes in February 1969. The next change was in November 1970, when Arco posted a nationwide increase of twenty-five cents. On May 4, 1973, Socal increased its California crude prices by another twenty-five cents, and a few days later Mobil added an additional one cent per degree for crudes under 18°. In each instance, the company instituting the price change was followed by the others in a matter of days. However, there is no indication that any of these mutual changes stemmed from prior agreement or understanding. On the contrary, all of the evidence submitted indicates that all of such changes were based upon the independent business judgments of the executives of the respective companies. It is normally to be expected that competition will cause companies dealing in fungible or standardized commodities, such as crude oil, to charge or pay parallel prices. *Weit v. Continental Illinois National Bank and Trust Company*, 641 F.2d 457, 463 (7th Cir. 1981); *Bendix Corporation v. Balax, Inc.*, 471 F.2d 149, 160 (7th Cir. 1972); *see also Krehl v. Baskin-Robbins Ice Cream Co.*, 664 F.2d 1348, 1357 n. 22 (9th Cir. 1982); *Hanson v. Shell Oil Co.*, 541 F.2d 1352, 1359 (9th Cir. 1976).

In light of all of the foregoing, and in the face of the detailed denials by the defendants, the plaintiffs have not "come forward with some significant probative evidence which suggests that conscious parallelism is the result of an unlawful agreement." *See Weit*, 641 F.2d at 462.

4. *Communication Of Pricing Information.* At the hearing on the summary judgment motions, the plaintiffs' counsel argued that the documents relied upon by the

plaintiffs require the inference that representatives of the defendants "were in constant communication with respect to price, with respect to prospective price moves, and with respect to actual price moves, and all of a sudden everybody is at the same price level." (Transcript page 664). Virtually all of the documents cited in support of this plus factor involve situations in which a defendant company had decided to change its posted prices on a certain date and had prepared and was mailing and otherwise publishing an announcement of such change. At about the same time, a representative of the company would make a "courtesy" telephone call to his counterparts in other defendant companies advising them of the impending change. Sometimes such calls would be made a day or so before the information became public, sometimes simultaneous. There is no indication that any of these telephone calls, as opposed to the public announcement, influenced any decision to change prices or otherwise had any anticompetitive purpose or effect.

Nonetheless, the plaintiffs contend that the supplying of such information is an inherent violation of Section 1 of the Sherman Act, under authority of *United States v. Container Corp. of America*, 393 U.S. 333 (1969). That case did involve exchanges of price information among the defendants, and the practices were declared illegal. However, the information supplied apparently "was not available from another source," and the Court inferred an agreement that reciprocal information would be supplied on request. 393 U.S. at 335. Justice Fortas, in concurring, expressed the understanding that the decision of the Court did not hold that "the exchange of specific information among sellers as to prices charged to individual customers, pursuant to mutual arrangement, is a per se violation of the Sherman Act." 393 U.S. at 338. In any event, it clearly is the law that the exchange of information concerning any change or contemplated change in prices does not, in itself, constitute antitrust conduct. *See Sugar Institute v. United States*, 297 U.S.

553, 603 (1936); *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 649 (1980); *Treasure Valley Potato Bargaining Association v. Ore-Ida Foods, Inc.*, 497 F.2d 203, 209 (9th Cir. 1974). Certainly, I can find nothing culpable in the defendants' giving each other information that is or is about to become public knowledge.

5. *Exchanges of Proprietary Supply Information.* This asserted "plus factor" is closely similar to the one just discussed. The plaintiffs contend that the defendants were constantly revealing to each other proprietary information that normally is not made available to competitors, and that such practice is an indication of conspiracy. This argument is based largely upon the experiences of Messrs. Vogt and Tolle, whose employer, Exxon, sent them to California in 1965. The plaintiffs are disturbed by several aspects of the reports that the two men made in the course of their visits and upon their return to Houston. Vogt and Tolle stated that they were cordially received by representatives of the defendant companies and that they obtained from them a considerable amount of information. However, I can find nothing culpable in the cordiality or in the information that was acquired.

The principal reason for Vogt and Tolle to come to California was to find a market for the large quantity of crude oil that Exxon shortly would be receiving as a co-producer from the East Wilmington Field. They thus had a legitimate interest in learning all that they could about the manner in which crude oil was bought and sold in this area; and, as potential purchasers of Exxon's new supplies of oil, the defendants had valid reasons to be cordial and cooperative. The information that was exchanged, as alleged by the plaintiffs, concerning forecasts of supply and demand, prices, and gravity differentials, comes within the area of this mutual legitimate interest.

A second purpose of the Vogt-Tolle trip was to explore available sources of supply of domestic crude oil for a

new refinery that Exxon was planning to build in Northern California. Here again, as prospective suppliers of such oil, the defendants had good reason to act cordially and cooperatively with representatives of a major prospective customer. Forecasts of the anticipated availability of various grades of crudes, their pricing trends, and the effect upon such prices of current and future refinery modifications, were matters of legitimate mutual concern that were freely discussed.

It was obvious that most of Exxon's anticipated sales or exchanges of oil would have to involve use of the other defendants' pipelines. Inasmuch as the three-cut exchange program frequently was utilized in pipeline transactions, Union gave Vogt and Tolle orientation concerning such program. In this connection, the plaintiffs seek to give support to their contention of conspiracy by referring to a document prepared by an Exxon employee which states, in part, that "a[s] you are probably aware, industry in California works together very closely and a great deal of exchanges are constantly being made involving a number of companies." This comment clearly pertains to the practice of the industry in utilizing the individually owned pipelines in exchanging various grades of crude oil in order to meet the needs of the respective companies. Such a practice does necessitate working together very closely and, as the memorandum stated in the sentence immediately following the quoted reference, "[t]he construction of a coastal refinery will provide us with the flexibility to make various types of crude and products exchanges."

The plaintiffs point with suspicion to the fact that the Exxon representatives discussed the location of the new refinery with defendant personnel and that the latter recommended that it be placed in Southern California. Future sales of crude to Exxon for its refinery and the availability of pipelines for transportation could hardly be discussed without considering where such refinery was to be located.

The plaintiffs assume that the foregoing tends to help them establish that there was a conspiracy to hold down the prices that the defendants would pay for the plaintiffs' heavy crude oil; that the goals of such conspiracy were accomplished through use of the three-cut exchanges; that Exxon knew of and participated in such three-cut exchanges; and that Exxon therefore must have known of the conspiracy and joined it. I have indicated my belief that the exchanges of information discussed in this section of this memorandum do not constitute a plus factor that points toward a conspiracy. In addition, both Vogt and Tolle have been deposed at length and have testified that throughout their many dealings with representatives of other defendant companies, there never was any suggestion of or reference to a conspiracy of any kind, nor did they infer the existence of any such conspiracy. In the face of such testimony, and in light of the valid reasons for the exchanges of information herein discussed, the speculations of the plaintiffs are devoid of significance as a plus factor. *See Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 928 (9th Cir. 1980).

6. *Manipulation Of Alaskan Crude Prices.* The plaintiffs charge that the defendants combined to maintain an unrealistic and unsupportable gravity price differential of five cents per degree in the prices that they posted for Alaskan crude oil, in order not to give cause to question the same differential that was conspiratorially set in California. The plaintiffs rely upon many documents that were prepared by employees of the defendant companies for internal consideration. These memoranda express views as to whether or not the respective employers should post crude prices, and, if so, what the prices and the gravity differentials should be. In some instances a writer would make the suggestion that a reduction of the gravity price differential in Alaska might provide arguments for those seeking to

bring the prices of heavy California crude up closer to the lighter crudes.

The memoranda also contained much speculation as to what other companies likely would do, and there were several expressions of uncertainty as to what courses the writers' companies should follow. Comments of this nature tend to belie, rather than to support, the concept of an agreement among the defendants governing the prices or the differentials that would be offered.

The memoranda disclosed the realization that the interests of the defendant companies were quite divergent. For example, since 1961, Socal had been posting prices higher than those offered by the others and which included a gravity differential of five cents per degree. It was "felt" that Arco "might adopt" a three or four cent differential. Mobil wanted to retain a spread of five cents per degree because the gas-oil that it gave up in exchanges was lighter than the oil that it received in return.

However, none of the documents contained any suggestion that the prices posted or to be posted in Alaska were determined by agreement among the various defendants, nor was there any indication of a mutual decision that Alaska prices should be fixed to be in harmony with the gravity price differentials in California or in the Wilmington Oil Field.

7. *The 1961-1962 Three-Cut Exchange Meetings.* The next "plus factor" relied upon by the plaintiffs is the fact that the 1961-1962 meetings to revise the three-cut definitions were held. The plaintiffs argue that representatives of the defendants sat down for an entire year trying to find a mechanism to avoid using the very posted prices that they had set, and that the only rational inference that can be drawn from such conduct is that the parties arrived at an understanding that they would maintain those distorted posted prices. (Transcript, pages 666-667).

On October 17, 1984, this court filed a Memorandum of Decision and separate Findings of Fact concerning cross-motions for summary judgment with respect to the accused three-cut exchange practices. There is no need to repeat here the descriptions and analyses of the three-cut process that are therein contained. The three-cut exchange practice had been going on since long before 1960, and such a practice is not inherently anticompetitive. By 1961, the measures of crude oil that the defendants were using in the three-cut exchanges had become outdated. This was largely because some of the defendants had installed sophisticated refinery equipment that caused heavier crudes to have increased values in relation to lighter crudes, which the current measures did not adequately take into account. The parties to the meetings were seeking to work out formulae that would better insure that the parties to an exchange would receive or get credit for oil having a refining value substantially equivalent to the oil that they delivered. Operations under the revised system resulted in the exchanges among the defendants being kept in relatively close balance, both as to amounts of crude oil delivered and received and the respective gravities of such oil.

Upon considering all of the evidence submitted, it is clear that the focus of the meetings was directed toward how to accomplish exchanges of oil *owned by the parties*, irrespective of whether such oil had been purchased from the plaintiffs or from another producer, imported from abroad, or lifted from a party's own wells. There is no indication from the documents or from the depositions or declarations of the participants at the meetings that there was any discussion with respect to posted prices.

In an earlier decision denying the defendants' motions for summary judgment with respect to three-cut exchanges, I said:

> "In one manner or another, the trader that gives up the heavier oil is going to be better off finan-

> cially under a [revised] three-cut exchange than he would have been had the transaction been based upon posted prices. To the extent that such a result stems from an agreement express or otherwise, designed to avoid increasing posted prices, it seems to me that it would constitute price fixing in violation of the antitrust laws."

Memorandum of Decision of October 17, 1984, page 12. As has been discussed above, the hearings on the present motions have disclosed that, apart from the speculations of the plaintiffs, there is no evidence of "an agreement, express or otherwise, designed to avoid increasing posted prices . . . ."

8. *Exxon's "Rigid Adherence To These Distorted Prices."* Exxon was not represented at the 1961-1962 meetings. However, its conduct following the Vogt and Tolle visits in 1965 is alleged to constitute a further plus factor disclosing a conspiracy and Exxon's part in it. According to the plaintiffs' dramatic summary, Exxon "comes out here. They are told about the distorted prices; they are told 'this is how we avoid them.' They are told the mechanism of the 3-cut. They are told about the values of the 3-cut and then Exxon jumps in with both feet and enters into the 3-cut exchange as soon as its refinery is on stream, and enjoys the benefits of the price-avoidance aspect of the 3-cut exchange, and when in fact this law suit was filed and things started falling apart, Exxon is in there proposing equally devious kinds of methods to avoid the posted price." In addition, according to the plaintiffs, there is "Exxon's inexplicable rigid adherence to these distorted prices . . ." despite a "serious, desperate, critical shortage . . . of heavy crude oil." (Transcript, page 1100).

As is indicated in the discussion of plus factor No. 5, "Exchanges Of Proprietary Supply Information," Messrs. Vogt and Tolle came to California in 1965 and were cordially received by the defendants. The reports that

they made back to Houston formed the bases for several of the plaintiffs' contentions. However, there is no indication that they received any information about prices of crude oil being "distorted". They did make the observation that ". . . to a modern refiner, the value differential is considerably less than the posted price differential." (Plaintiffs' Common Issues Brief, Exhibit 202). They were told of the use of the three-cut procedure; they also learned that many crude trades are made under the three-cut program rather than at posted prices, because ". . . efficient refiners see considerably less value for increasing gravity than the 6c/° API gravity price would indicate." *Id.* The Exxon representatives considered this information important because they anticipated that following the construction of a coastal refinery and the use of other companies' pipelines, Exxon would be participating in three-cut exchanges.

Here again, the record discloses no suggestion that the three-cut system was the result of a conspiracy to hold down posted prices. In the absence of such a conspiracy, I am unable to find anything culpable in a three-cut program. A refiner is not obliged to pay more than market prices for crude oil even though its value to him is greater because of the efficiency of his operation. By the same token, the market need not govern the value that he will place upon such oil in an exchange or a sale to another.

Perhaps it could be said that Exxon did "jump[s] in with both feet and enter[s] into the 3-cut exchange" as soon as its Benecia refinery came on stream in 1969. Some of these transactions occurred because the owners of the pipelines that Exxon wanted to utilize required a three-cut exchange. In other instances, it was to Exxon's financial advantage to make use of the lesser gravity differential of the three-cut exchange program.

The plaintiffs refer to two "devious kinds of methods to avoid the posted prices." One apparently was a proposal

that a synthetic Badger test be used to make a comparative valuation of various types of crudes and eliminate the expensive distillation process. The other reference was to an internal Socal memorandum that vaguely reported a suggestion made by a Mr. Clarke of Exxon after this suit was filed to the effect that some kind of a "value" exchange might be substituted for the three-cut system. These items are of doubtful materiality and are not sufficiently developed to warrant the "devious" designation.

With respect to the "serious, desperate, critical shortage . . . of heavy crude oil," it is obvious that in 1969 Exxon was anticipating or experiencing an inadequate supply of domestic heavy crude for its newly operating Benecia refinery. The plaintiffs point to contemporaneous documents that refer to such shortage with varying degrees of alarm. But these documents also discuss means of alleviating the problem, such as importation of Canadian oil (Section VIII, Tab 28 of the plaintiffs' documents in support of their oral presentation regarding the summary judgment motions); receipt of a cargo of Swedish crude and deliveries from Arco that would take care of the problem through July (Tab 30); sell off light crude "if it can be replaced with heavy crude" (Tab 31); take options on available crudes (Tab 32); "import heavy foreign crude" (Tab 34). The plaintiffs content themselves with pointing to the expressions of apprehension, and they make no comment as to whether or not any of the proposed remedies were applied, thereby easing the shortage.

One of the memoranda upon which the plaintiffs rely is dated July 1, 1970, and asserts "[n]ext year we are going to be in desperate need for heavy California crude" (Tab 34). This perceived problem became compounded by the shortage of imports from the Middle East during the latter half of 1970 and the early part of 1971. According to Exxon, the problem was resolved by the importation in 1971 of 1,700,000 barrels of heavy Bachaquero

crude from Venezuela for the Benecia refinery. Exxon submitted in these proceedings an affidavit by W. J. Walstead. He stated that the delivered cost of this Venezuelan crude was lower than the delivered cost of comparable heavy California crudes and that as a result of such imports "I am not aware of any extended period of time when I was Refining Crude Coordinator [1969 to 1973] that the Benecia refinery sustained shortages of crude, either heavy or light." (Walstead Affidavit, paragraph 8). There is nothing in the record to the contrary.

Under these circumstances, the unwillingness of Exxon to overcome its "shortages" by bidding up the prices of California crude is hardly "inexplicable," much less an indication of conspiracy.

9. *Admission Of Shell Into THUMS.* The next plus factor urged by the plaintiffs is the action taken by the other defendants to persuade Shell not to begin posting prices in the East Wilmington field. The script goes like this:

(a) Despite its earlier participation in the conspiracy to keep heavy crude prices low, in 1964 Shell was contemplating that it might start posting prices in order to acquire a larger share of heavy crude.

(b) Texaco, Exxon, Union and Mobil (who made up the THUM consortium that would bid to produce and receive 80% of the oil from the East Wilmington field) were aware of such contemplation and feared that if Shell were to start posting it might become a "loose cannon" and cause a "breakout of competition in the marketplace." (Transcript, pages 1122 and 1123).

(c) Each of the THUM companies was anxious to get as large a share in the forthcoming oil production venture as it could and was reluctant to reduce its 25% by admitting another partner. Union and Exxon were definitely willing to go to a one-third share. (Transcript, page 1125).

(d) The THUM companies believed that the admission of Shell to their group would keep Shell from posting, and so they combined to accept Shell in return for its promise not to post.

The documentary record gives quite a different story:

(a) In 1964 two internal memoranda were written by Shell employees which recommended that Shell start posting because a continuation of the large gravity price differential would put Shell at a comparative disadvantage. (This is scarcely in harmony with the concept of Shell's being a participant in an alleged conspiracy to keep the differential high.)

(b) In the spring of 1964, two Socal documents (Tabs 6 and 7 of Section IX of the plaintiffs' submission at oral argument of the summary judgment motions) reported that Shell had "indicated" that it was thinking of posting in California in order to acquire additional supplies of heavy crude. Of course, Socal was not one of the THUM companies, and we do not know to what extent, if at all, Shell's "thinking" was made known to them.

(c) In the course of the meetings resulting in the formation of THUM, the participants were not desirous of being members of a five-party group, and they discussed what they would do if one of the current four were to drop out. According to the December 7, 1981 deposition of Leonard C. Stevens, the Mobil representative:

> "A In the meetings, the joint meetings, we all discussed the possibility if anybody dropped off would the other parties step up to a third, and I think all of us—Humble [Exxon] definitely said they would. We [Mobil] were probably a little more reserved on that point.
>
> Q Did Texaco say anything along that point?
>
> A They were reserved, too.

Q Union?

A I think they were more bullish than we were." (Page 41).

It appears that this is the basis of the plaintiffs' conclusion that Exxon and Union were definitely willing to go to one-third interests. According to Mr. Stevens, although Mobil authorized him to take up to a one-third share, if necessary, "[t]hey also put a rider on it, if we could get the other people to step up, that would be okay with them." (Deposition, page 53).

(d) Shell was desirous of participating in the anticipated East Wilmington field production. It would have preferred to bid alone but could not absorb the entire Field Contractor's 80% share of the total production. Shell's offer to join the Socal-Arco-Signal combination that was planning to bid was rejected, and it therefore applied to the THUM group.

(e) Shell's final application for admission to THUM on an equal basis with the other four, or 20%, was made orally by a Mr. Jerry Burton to Mr. Stevens. According to the latter, he told Mr. Burton that he, Stevens, would have to check with the other companies and with his own management. He did so, and they all said to let Shell in. According to Mr. Stevens, Mobil considered the inclusion of Shell to be attractive because it reduced the risk of Mobil receiving more oil than it wanted, and it also reduced the size of each company's required capital investment. (Stevens deposition, page 115).

(f) Mr. Stevens testified that the matter of Shell posting or not posting never was discussed at any of the meetings of the THUM group, nor did he have any such discussion with anyone at Shell. (Stevens deposition, page 134, 154-55).

From the foregoing, it is evident that the record contains no factual basis to justify the conclusion that the

THUM participants conspired among themselves and with Shell to admit the latter to THUMS in return for Shell's agreement not to post prices. The plaintiffs ninth plus factor can only be described as speculation bordering on fantasy.

10. *The Economists' Opinions.* The plaintiffs cite as their tenth plus factor the opinions of their experts that the crude oil market was noncompetitive and it therefore must have been controlled by conspiracy. Such opinions are based upon an economic principle stated as follows:

> "In a competitive industry each refiner will maximize profits by consuming each crude oil input up to the point that its marginal value equals the market price. If a refiner has a higher valuation for a crude than the market price, it will expand its use until the value of the last (marginal) barrel used is equal to its price."

Affidavit of Dr. Thomas R. Saving dated May 17, 1984, page 2.

Factual studies by the economists have caused them to assert that the marginal values that the defendants ascribed to their heavy crude oil exceeded the posted prices, but the respective defendants did not bid up the prices that they offered to pay for heavy crude oil in order to increase their supplies. The conclusion follows that the market was collusively maintained.

As is acknowledged earlier in this memorandum (page 15), the economic principle quoted above appears to have theoretical validity, and the defendants have not challenged it. But in order for this principle to be applied to the present case, several factual assumptions must be made, among which are:

(a) That the defendants, acting independently, would have been unable to acquire, at posted prices, the quanti-

ties of crude oil, domestic or foreign, that they believed appropriate for processing through their refineries.

(b) That the marginal values upon which the experts relied provided, without more, a sufficient foundation upon which to base a program of increased purchases at higher prices and despite all of the expensive consequences that would accompany such actions.

(c) That the respective defendants were aware of the validity of the foregoing assumptions and thus their failure to seek more crude oil at higher prices stemmed from conspiratorial collusion rather than from honest (even if benighted) management decision.

This court should not, and would not, knowingly, disregard the unchallenged opinion of an expert in his own field. But it is the function of the court, rather than the expert, to determine whether or not there is enough evidence in the record to create a factual issue in support of the hypotheses upon which the expert opinion is based. Having examined and pondered over the record as best I have been able, I have concluded that such evidentiary support is lacking, as is indicated throughout this memorandum.

11. *Crude Oil Surveys.* The record shows that the defendants frequently exchanged information concerning their respective supplies of various types of crude oil, as well as their needs for such oil, and the plaintiffs point to this practice as constituting an illegal conspiracy. However, testimony by responsible representatives of the defendants has emphasized that there were valid, legitimate reasons for such exchanges of information and for the formal surveys periodically conducted by Mobil and Socal. None of the defendant companies had direct control over, or access to, all of the crude oil of the proper mix that they needed in their refineries. Accordingly, as a matter of competitive self-interest, they were constantly alert to keep track of trading opportunities. The

tasks of their "trader" employees were to ascertain what crudes other refiners had in surplus and what crudes they might want to obtain in exchange, either immediately or in the foreseeable future.

The case of *United States v. United States Gypsum Co.*, 438 U.S. 422, 441, n. 16 (1978) contains a comment that is particularly significant here:

> "The exchange of price data and other information among competitors does not invariably have anticompetitive effects; indeed such practices can in certain circumstances increase economic efficiency and render markets more, rather than less, competitive . . . A number of factors including most prominently the structure of the industry involved and the nature of the information exchanged are generally considered in divining the procompetitive or anticompetitive effects of this type of interseller communication."

In the absence of direct evidence to the contrary, it is beyond factual dispute that the surveys and other exchanges of information here concerned had legitimate business purposes. Apart from the speculation of the plaintiffs, there is no indication that such exchanges had any effect upon the current prices paid to the plaintiffs or had any other sinister purpose or result.

Conclusion. Throughout my consideration of these motions for summary judgment, I have had thoroughly in mind the injunction of the Supreme Court as set forth in *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 473 (1962):

> "We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination

> that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice.' "

However, to use "sparingly" does not mean never. In a later antitrust case, the Supreme Court affirmed an award of summary judgment to the defendant. The opinion of the Court, written by Justice Marshall, stated:

> "While we recognize the importance of preserving litigants' rights to a trial on their claims, we are not prepared to extend those rights to the point of requiring that anyone who files an antitrust complaint setting forth a valid cause of action be entitled to a full-dress trial notwithstanding the absence of any significant probative evidence tending to support the complaint."

First National Bank v. Cities Service Co., 391 U.S. 253, 290 (1968). The latter comments are applicable here. This case has been pending for ten years. During this period, literally hundreds of depositions have been taken, and many thousands of documents examined in discovery proceedings that must have been exhausting. Certainly, the plaintiffs have had ample opportunity to obtain all of the evidence that they could expect to present at a trial.

During the years that this case has been before me and, more particularly, in undertaking to adjudicate these summary judgment motions, I have devoted a great deal of time in trying to achieve a full understanding of the contentions of the parties as set out in their briefs and their oral arguments and documented by their exhibits. Although I cannot assert with confidence that I have a complete grasp of all of the evidence contained in the very large record that has been amassed, my understanding must necessarily exceed that which could be expected of the members of a jury.

As is indicated early in this memorandum (page 10) the plaintiffs do not have any testimony or documents that give direct support to their theory of conspiracy. They therefore have been obliged to seek circumstantial proof. With great effort and remarkable imagination, they have presented the plus factors that have been discussed in this memorandum. In the preceding discussion, an attempt has been made to show why the evidence presented in support of these plus factors does not warrant an inference of conspiracy. The discussion has been far from exhaustive, in light of the complicated nature of some of the contentions and the many disparities among some of the positions and conduct of the various defendants. If we start out with conspiracy as an established fact, some of the conduct of some of the defendants regarding some of the plus factors can be harmonized with that assumption. However, such conduct is equally in accord with the legitimate pursuit of independent interests. And in many instances, the actions of the defendants and the contemporaneous comments of their representatives are completely inconsistent with the existence of a conspiracy to maintain low prices for crude oil.

> "The verdict of a jury cannot rest on guess or speculation. . . . The jury is not permitted to speculate in choosing one of alternative possibilities, but is restricted to reasonable inferences based upon facts . . . .' (T)he province of fact finding and inference drawing must be exercised in the realm of probability, not speculation, surmise and conjecture.' "

Wolf v. Reynolds Electrical & Engineering Co., 304 F.2d 646, 649-50 (9th Cir. 1962) (citations omitted).

Being mindful of this rule, I have pondered whether the record here developed contains enough facts upon which a reasonable jury could draw an inference of liability that would be "exercised in the realm of probability, not speculation, surmise and conjecture." I am con-

fident that it could not. Accordingly, summary judgment is granted to the respective defendants on the antitrust issues.

Pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, there is not just reason for delay in the entry of final judgment on the plaintiffs' antitrust claims, and final judgment for the defendants on these claims shall be entered immediately.

DATED: September 19, 1985.

/s/ William P. Gray
WILLIAM P. GRAY
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case Number MDL #150
CV 75-2232 WPG

IN RE: COORDINATED PRETRIAL PROCEEDINGS
PETROLEUM PRODUCTS ANTITRUST LITIGATION

NOTICE OF ENTRY

TO THE ABOVE NAMED PARTIES AND TO THEIR ATTORNEY(S) OF RECORD:

You are hereby notified that MEMORANDUM DECISION GRANTING DEFENDANTS' SUMMARY JUDGMENT MOTIONS REGARDING ANTITRUST CLAIMS in the above entitled case was entered in the docket on 9/20/85.

You are also notified that if this case was tried and you introduced exhibits into evidence, they must be claimed at this office *after* the expiration of thirty days from the receipt of this notice. (After *sixty* days in cases in which the United States, its officers or agencies were parties) Unless they are claimed within thirty days after the expiration of the above period, they will be destroyed pursuant to Local Rule 29.2. If an appeal is taken they will, of course, be held until the Appellate Court finally determines the matter. Exhibits which are attached to a pleading will not be destroyed but will remain as a permanent record in the case file.

CERTIFICATE OF MAILING

I, Clerk of the United States District Court, Central District of California, and not a party to the within action, hereby certify that on 9/20/85, I served a true copy of this notice of entry on the parties in the within action by depositing true copies thereof, enclosed in sealed envelopes, in the United States Mail in the United States Post Office mail box at Los Angeles, Cailfornia, addressed as follows:

Thomas Dove, Deputy Attorney General
6000 State Building
350 McAllister Street
San Francisco, CA 94102

Gary Hoecker
612 S. Flower St #800
Los Angeles, CA 90017

Philip L. Judson
Pillsbury Madison & Sutro
Standard Oil Building
225 Bush St.
San Francisco, CA 94102

Ronald Charles Redcay
Hughes Hubbard & Reed
515 S. Flower St #4400
Los Angeles, CA 90071

Clerk
U.S. District Court

By N. Maldonado
Deputy Clerk

NOTICE

IN ACTIONS ARISING UNDER THE ECONOMIC STABILIZATION ACT, THE EMERGENCY PETROLEUM ALLOCATION ACT, AND THE ENERGY POLICY AND CONSERVATION ACT, NOTICES OF APPEAL TAKEN FROM THIS JUDGMENT MUST BE FILED IN THE TEMPORARY EMERGENCY COURT OF APPEALS IN ACCORDANCE WITH THE RULES OF PROCEDURE OF THAT COURT.

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MDL Docket No. 150 WPG

LONG BEACH: CV 75-2232-WPG

IN RE COORDINATED PRETRIAL PROCEEDINGS IN PETROLEUM PRODUCTS ANTITRUST LITIGATION

MEMORANDUM OF DECISION

[Filed Oct. 17, 1984]

Both sides have moved for summary judgment with respect to the legality of the practice known as the three-cut exchange. There have been extensive briefing and argument. Counsel were first heard on July 28, 1983. Formal hearing on the cross-motions took place on April 25 and 26, 1984, and this Court took the matter under submission. The subject also arose during the July 24, 25, 26, 1984 hearings regarding the allegedly fatal concessions of the plaintiffs' experts, since one of the experts had been designated to testify regarding the three-cut exchange system. The motions of the plaintiffs and of the defendants[1] for summary judgment now are both denied. I am, concurrently with the filing of this Memorandum, adopting some findings of fact and conclusions of law.

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[1] Exxon did not join in the defendants' motion.

I. PLAINTIFFS' ARGUMENTS FOR PER SE ILLEGALITY

The plaintiffs contend that the three-cut exchange program, as conceived and employed by the defendants, is *per se* illegal under section 1 of the Sherman Act for three independent reasons: 1) that it removed crude oil price transactions from the marketplace and thereby interfered with the setting of prices by free-market forces; 2) that it enabled the defendants to avoid posted prices and thereby interfered with the competitive price mechanism; and 3) that the specific gravity adjustment to cut 3, itself, fixed a price. The plaintiffs argue that there is no material issue of fact with respect to any of these.

An important distinction is relevant to each of these arguments, namely, a distinction between the market for the purchase of crude oil at the well-head and the secondary, subsequent market in which the defendants exchanged the supplies of crude that they bought or produced. The troublesome question regarding the three-cut exchange has always been how transactions in the second market affected the first. The plaintiffs allege an antitrust injury in the first market—the market where the City of Long Beach sold its crude oil (and the crude oil of the State of California) to refiners. In order for the defendants' non-price system of exchange to fall under the proscription of *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978), and thereby create liability to the plaintiffs, it must be established that either the purpose or the effect of the agreed-upon practice was to restrain competition in the market where the plaintiffs sold oil. This is more than a matter of standing to assert damages. *Cf. Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982). It is a matter of anticompetitive conduct; but there is nothing inherently anticompetitive or illegal about a system of trade in which commodities are exchanged for commodities.

A. Removal of Price Transactions from the Marketplace

If one accepts the above distinction between "markets" for the purpose of antitrust analysis, it follows, literally, that no price transactions were "removed" from the relevant marketplace: once a barrel of oil is pumped from the ground and sold at the well-head for a posted price, the fact that it thereafter is swapped by the purchaser to someone else does not erase the first transaction, no matter whether the subsequent exchange is for a barrel of similar crude, a basket of sea shells or a bundle of dollar bills.

However, the plaintiffs argue further that the exchange system interfered with the setting of the prices of crude oil by free market forces. To the extent that the plaintiffs here refer to the "prices" prevailing in exchanges in the secondary market, the above analysis of markets is germane, and the plaintiffs' *per se* argument must fail. To the extent that the plaintiffs here refer to the posted prices (the prices prevailing in the market for the sale and purchase of crude at the well-head), a new question is raised: how did or could the non-price system in the secondary market disrupt or depress the price system in the primary market? A plausible theory, and one asserted by the plainitffs in another context, is that if the defendants had traded among themselves entirely on the basis of posted prices, they would have been forced to raise the posted prices of heavy crude to the level of the "true" value of the crude (the value or rate of exchange prevailing in the barter market) in order to avoid the damage wrought by trading away their heavier crudes on the basis of artificially low prices. This argument is more closely related to the second asserted ground for *per se* illegality, to which we now turn.

B. Avoidance of Posted Prices

The plaintiffs argue that the clear purpose of the defendants in using the three-cut exchange was to avoid, in dealing among themselves, the very prices that they posted, and that this practice constitutes interference with the pricing of crude by free-market forces. In support of their *per se* argument, the plaintiffs rely upon *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978), where the Court struck down a price-avoidance provision of an "ethics code" regulating the methods by which prospective clients engaged the services of professional engineers. The Society's code provision directly banned price comparisons in the initial selection of an engineer. The purpose and effect of the restraint were plainly to stifle price competition.

The alleged restraint here is not so plain, for it does not operate directly on the sale of oil by the plaintiffs to the defendants and similar buyers. It does not "ban" price transactions in the marketplace where plaintiffs have complained of an anticompetitive injury. But the *per se* inquiry does not end simply because the link between the three-cut exchange and the pricing of crude oil is less explicit than was the connection in *Professional Engineers*. The plaintiffs add another layer to the alleged *per se* plot. The reason that the defendants wished to avoid posted prices, according to the plaintiffs, is that posted prices "did not properly reflect crude values," and the conspiratorial avoidance of posted prices in exchanges meant that it was not necessary for the defendants to offer to pay to the plaintiffs amounts that would reflect competitive crude values. (Plaintiffs' Memorandum in Support at 30; Reply at 15, 16.) Thus, the plaintiffs posit a specific causal connection between the exchange system and the pricing of crude oil in the relevant marketplace.

There remains, however, a question of fact regarding this link. Defendants, as will be seen, vigorously deny that there could have been any anticompetitive effect of the exchange system upon the posted prices. And, in fact, the plaintiffs themselves recognize that the issue whether the "purpose and effect of the three-cut exchange was to prevent competitive pressures from raising the price of crude oil to their true value" is an issue that "involves material facts which are controvertible." (Plaintiffs' Opposition to Defendants' Motion at page 20.) Thus, the second *per se* argument fails. If plaintiffs are to succeed on their claim that the three-cut exchange system is illegal as a price avoidance mechanism, they must demonstrate to the satisfaction of the trier of fact that the posted prices themselves were anticompetitively low and that a purpose of the three-cut system was to aid in the maintenance of those prices to the benefit of the defendants and to the detriment of plaintiffs.

C. The Specific Gravity Adjustment as a Price-Fix

It is undisputed that three-cut exchanges were employed by the defendants prior to the 1961-62 mettings that the plaintiffs assert were the genesis of the conspiracy. What the meetings accomplished was an agreement upon new technical definitions of the three "cuts" of crude oil. The new definitions measured quality by two yardsticks—first viscosity and then density—which could be applied to any of the very different crude oils produced in California and which were more precise than the simple API degree designation for the whole crude oil. For trading purposes, the defendants agreed: 1) on the viscosity definitions, or end boiling points of cuts 1 and 2, which correspond to distillation yields that might be obtained from each cut; 2) that cut 3 would be defined as the remainder, or residue, after the end boiling point of cut 2; and 3(that, as a further refinement, volumes of cut 3 traded would be subject to a specific gravity

adjustment to 16 degrees API. In this adjustment is disguised a price, say the plaintiffs.[2]

Though the technical aspects of this argument are daunting, I believe that it is appropriate to set forth my understanding of them. Specific gravity is a measurement of the density of a substance relative to the density of water. The API scale is usually a more convenient way to describe the densities of crude oils. However, for purposes of keeping track of the qualities and quantities of cut 3 exchanged, the traders needed a very accurate method of adjusting volume. The need for accuracy arose because the cut 3 components of two different crudes of the same API gravity could be significantly different. A volumetric adjustment to the books of the trading partners was the easiest way to account for the differences in quality between two equal-volume crude oil and/or their cut components.

After discussion and study, the defendants agreed upon a base of 16 degrees API against which to measure the qualities of cut 3 traded and with which to compute a volumetric adjustment. If a company delivered one hundred barrels of a crude oil whose cut 3 component was 70% per barrel, the company, in industry parlance, delivered 70 barrels of cut 3. If that particular crude oil was determined to have a cut 3 component whose gravity was 14 degrees API (heavier than 16 degrees), the trading company would get credit for delivering somewhat less than 70 barrels of cut 3. Conversely, if the crude

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[2] Exxon was not in attendance. It cannot be disputed that the defendants that were present expended a lot of time and effort in arriving at mutually satisfactory definitions and measurements. The defendants assert that the meetings did not result in an agreement to use the new definitions, but of course the system would not have worked unless the defendants did each employ the same measurements. And, in fact, the defendants did just that beginning in April, 1962. Exxon used the agreed-upon definition in its exchanges beginning in 1969, when its refinery came on line.

involved had a cut 3 component whose API gravity was 20 degrees (lighter than 16 degrees) the trading company would get credit for delivering more than 70 barrels of cut 3. The volume credited to the delivering company, or the "adjusted volume," is computed by multiplying the volume actually delivered by a fraction, the numerator of which is the specific gravity of 16 degrees (API) cut 3 and the denominator of which is the specific gravity of the cut 3 actually delivered.

The question is whether this method of volumetric adjustment involved any "price." On the face of it, there is no dollar amount, and the plaintiffs do not contend otherwise. Rather, the plaintiffs contend that an approximately two cent per degree (API) differential[3] was *implied* in the specific gravity adjustment. That is, the plaintiffs contend that the defendants were trading among themselves on a basis that did not penalize heavier crude oils as much as did the posted price scale, where the gravity-price differential was approximately 5 or 6 cents.

As a matter of mathematics, the only way in which a "price" (per degree or otherwise) can be detected in the defendants' use of the specific gravity method is by the introduction of some refinery value expressed in dollar terms. That is, only by looking at the specific gravity adjustment from the vantage of an oil company that places a value on cut 3 can one see that a change in dollar value per degree change in gravity is implied. Working with the technical information on specific gravities provided in the appendix to the defendants' opening brief, and taking the refinery value of $2.85 per barrel assumed by Shell to apply to a 16 degree cut 3 in 1962, as well as hypothesizing values down to $2.35, it is apparent that the specific gravity method yields on average,

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[3] "Gravity-price differential" refers to the change in price associated with every degree change in API gravity.

a gravity-price differential of approximately two cents per degree. That is, over a fifty-cent range in possible refinery values for a barrel of cut 3, the application of defendants' method yields an average gravity-price slope of two cents.

There are two important observations to be made about the above conclusion. First, the gravity-price differential calculated in the paragraph above has been shown to be applicable only to cut 3, and not to the whole crude oil. The defendants have injected enough doubt about the relation between cut 3 and the whole crude so that it cannot be held, on plaintiffs' motion, that the gravity adjustment for cut 3 "fixed" the price or the gravity-price differential of a whole crude oil. Second, the conclusion that a price per degree is involved is based entirely upon the dollar value of cut 3 assumed to prevail in the refineries of one defendant. Thus, because the defendants had different refinery values for cut 3, the specific gravity method had a different internal meaning, in terms of cents per degree, for each.[4] The difference may have been slight,[5] but the point is that the defendants did not agree on a *single* gravity-price slope, even for cut 3. Rather, even if we assume that it is proper to compare cut 3 values with the whole crude values, the effect of the specific gravity methodology would be to preserve for each defendant a gravity-value slope on the exchanges that approximated its internal gravity-value slope and was flatter than the posted gravity-price slope. This may or may not have introduced a rigidity in the pricing mecha-

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[4] In fact, due to the nature of the exchange system, the defendants had to confront different dollar values (explicit or implicit in product-cut ratios) only when settling imbalances.

[5] The difference would be slight if the defendants had internal refinery values for cut 3 (or for heavy oil) that were similar to one another.

nism.[6] That depends upon the relationship between cut 3 and the whole crude, about which there is genuine debate.

II. DEFENDANTS' ARGUMENT THAT THE THREE-CUT EXCHANGE IS LEGAL, UNDER PER SE AND RULE OF REASON ANALYSIS

The defendants' motion on the issue of the three-cut exchange seeks a partial summary judgment to the effect that: 1) the practice is not *per se* illegal; and 2) the practice is valid under the rule of reason. The defendants argue that the facts are undisputed that the three-cut exchange system, as employed by them, is pro-competitive and has absolutely no anticompetitive purpose or effect.

The Supreme Court has cautioned in the antitrust context that "easy labels do not always supply ready answers." *Broadcast Music Inc. v. Columbia Broadcasting Systems*, 441 U.S. 1, 8 (1979). This is particularly true in the instant situation. The complexity of the challenged practice makes categorization very difficult.

It is clear that, standing alone, the defendants' three-cut exchange system (including the specific gravity method) is not "price fixing" in the sense in which that term is most often used. "Price fixing" is a "shorthand way of describing certain categories of business behavior to which the per se rule has been held applicable." *Broadcast Music, supra*, 441 U.S. at 9. The challenged practice is not an explicit agreement on a price; it is not an agreement not to bid or advertise price; it is not an agreement to buy excess supplies so as to relieve the market of a glut of product.

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[6] It seems to me that if there is injury to the plaintiffs here, it stems from the disparity between the defendants' internal refinery values (and gravity-value differentials) and the posted prices (and posted price differentials).

It is also clear that the exchange system had pro-competitive effects. Some of these are listed at pp. 34-35 of defendants' Memorandum in Reply, and I find the statements there numbered 1-6 to be established without substantial controversy. The plaintiffs do not disagree that some form of exchange of crude oil was necessary to the efficient functioning of the refining industry. Because of the refineries' need for continuous supply, the location and number of trunk pipelines, and the fact of private pipeline ownership, oils had to be commingled between the well-head and the refinery. A company naturally desired to ensure that the quality of crude oil that it produced or purchased would be substantially the same as the quality that found its way to the company's refinery. Posted prices could have been used to account for whole crudes exchanged, but if a more precise indicator of quality was desired, some sort of petro-chemical measurement had to be used. What the defendants gained in precision via the use of badger tests and three-cut accounting was probably offset somewhat by the loss of ease of administration.

In view of the foregoing, if it were proper for me to view the three-cut exchange in isolation, I would have to coenlude that the practice is not *per se* illegal but instead is to be judged under the rule of reason. On the other hand, it is equally clear that I cannot conclude, on a motion for summary judgment, that the exchange system, in context, had neither an anticompetitive purpose nor effect. The possible anticompetitive effect of the practice was described above in connection with the plaintiff's arguments. As for evidence of anticompetitive purpose, there are several defendant documents prepared in the 1960's showing that the defendants recognized the disparity between posted prices and internal values for heavy crude oil (*e.g.*, the May 6, 1965 Memo circulated among Arco employees [exh. 1 to the plaintiffs' reply] and that the value-price disparity was a factor in the wide-spread

use of the three-cut exchange (*e.g.*, the April 19, 1968 Mobil memo from F.M. Springer; the March 13, 1969 Union Oil memo from Mr. Said; the June 10, 1964 letter from a Texaco employee to a Signal Oil employee). I would therefore have to conclude that the defendants are not entitled to a summary judgment of legality under the rule of reason.

The thrust of the above, rather tentative, discussion is that the three-cut exchange system should not, for purposes of the defendants' *per se* motion, be viewed apart from the allegation by the plaintiffs that the defendants conspiratorially designed and maintained such system as a means of avoiding having to raise their postings to the level of the competitive value of the crude oil. Such a contention raises questions of fact that the present record does not resolve, and the defendants' request for summary judgment is accordingly denied.

III. CONCLUSION

From all of the foregoing, I have concluded that factual considerations render summary judgment inappropriate on the three-cut issue. However, I am troubled by some strong impressions that, if confirmed by the facts at trial, would indicate liability on the part of the participating defendants.

If the posted prices for cut 3 oil had a spread of approximately five cents per degree of specific gravity and the defendants traded among themselves pursuant to a spread of about two cents per degree, significant legal results follow, unless each trade involved equal quantities and qualities of oil. Under the two cent spread, a higher relative value is necessarily given to the heavier oil than would be accorded the same quality oil under posted prices. It makes no difference whether the adjustment is made by only a bookkeeping entry, or in cash, or by giving credit for a somewhat larger

amount of oil than was actually received. In one manner or another, the trader that gives up the heavier oil is going to be better off financially under a three-cut exchange than he would have been had the transaction been based upon posted prices. To the extent that such a result stems from an agreement, express or otherwise, designed to avoid increasing posted prices, it seems to me that it would constitute price fixing in violation of the antitrust laws.

The respective motions of the parties for summary judgment are denied. I have, however, modified and approved some Findings of Fact submitted by the defendants, and these will be filed with this Memorandum.

DATED: October 17, 1984.

/s/ William P. Gray
WILLIAM P. GRAY
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MDL Docket No. 150-WPG
LONG BEACH

IN RE: COORDINATED PRETRIAL PROCEEDINGS
IN PETROLEUM PRODUCTS ANTITRUST LITIGATION

FINDINGS OF FACT
(REGARDING THREE-CUT EXCHANGES)

[Filed Oct. 17, 1984]

The court supplements its Memorandum of Decision of October 17, 1984, denying cross motions for summary judgment with respect to three-cut exchanges by making findings of fact as follows:

1. Refiners in California have three potential sources of crude oil: (1) Production from their own development, (2) purchases from other domestic crude oil producers and (3) importation from foreign sources.

2. Historically, refiners with rare exceptions have been the only purchasers of crude oil. Most crude oil produced in the United States is sold or transferred at the wellhead at prices posted by refiners. The price posted by a refiner is the price the refiner pays for crude oil purchased in that field and typically states a different price for each degree of API gravity. Posted prices differ from field to field for the same gravities of crude oil to reflect transportation differentials as well as quality differentials. Many refiners have long term contracts with do-

mestic producers to purchase their crude oil production generally at the posted price, the average posted price or the highest posted price.

3. Owing to logistics, quality differences in crude oil and competitive pressures, refiners may acquire crude oil in excess of their refinery needs. Thus the sale of surplus crude oil at posted price was often necessary. These posted price sales often involved heavy crude oils in general and Wilmington crude oil in particular and were made to both other defendants and independent refiners. Defendants bought and sold millions of barrels of crude oil at posted prices throughout the relevant time period.

4. The transporting of crude oil to a refinery is the responsibility of the purchaser. The principal methods available to a refiner to accomplish the transportation of crude oil from the oil field to the refinery are existing pipelines (gathering lines and trunk lines), trucks, barges and ships and a combination of these methods. The transportation of crude oil by pipeline is much cheaper than by truck, but the construction of new pipelines requires capital commitments. Therefore the transportation of crude oil by existing pipelines is often preferred.

5. An exchange of crude oil is a transaction whereby a refiner delivers title to a specific quantity and quality of crude oil at a specified time and place and receives in return a specified volume of crude oil, usually at a different place and sometimes at a different time. The principal purpose of exchanges is to transport crude oil efficiently, usually through existing pipelines, to the most conveniently located refinery. Sometimes a purpose also may be to adjust the quality of crude oil run in the refinery.

6. Posted price exchange is an exchange of crude oils in which accounting is based on the prices posted for each. Frequently posted price exchanges have involved

equal volumes of crude oil received and delivered by each trading refiner, with adjustments in cash made by reference to the corresponding posted prices of the crude oils.

7. A three-cut exchange is an accounting method which attempts to balance the volumes of three distillation ranges of hydrocarbon stocks ("cuts") derivable from each of the crude oils exchanged. Cut 1 is the light end, equivalent to straight run gasoline, Cut 2 is the mid-barrel, roughly equivalent to stove oil or kerosene, and Cut 3 is the heavy end from which fuel oil and asphalt are produced. Each party to the exchange accounts for each of the three cuts as contained in the crude oils exchanged. The Badger Distillation test is used to determine the percentage of the crude oil allocable to each of the three cuts.

8. The use of exchanges among refiners allows efficient use of existing pipelines and reduces transportation cost. Crude oil near one company's refinery or pipeline can be exchanged for crude oil located in the vicinity of another company's refinery or pipeline. A pipeline owned by one refiner can be used for the transportation of crude oil for another. Because the pipelines in California have traditionally been privately owned and not operated as common carrier public utilities, crude oil placed into the pipeline is exchanged for the crude oil taken out at the other end. In this way the title of the crude oil is with the owner of the pipeline during the time it is in the pipeline. Exchanges save transportation costs and result in lower prices to consumers of petroleum products.

9. Posted price and three-cut exchanges and variations of these general categories have given refiners in California flexibility in negotiating exchanges. The availability of a variety of types of exchanges increased the likelihood that the benefits, primarily the saving of transportation expenses, derived from exchanges would be realized.

10. Each defendant had numerous posted price exchanges with other defendants and with independent refiners.

11. Three-cut exchange transactions among refiners have no material effect upon the overall supply of or demand for crude oil produced at the well-head. This is also true of posted price exchanges on an equal barrel basis. Most exchanges are by definition a wash. The overall supply and demand for crude oil is determined by domestic crude oil production and importation, on the one hand, and the requirements of refiners for crude oil on the other. The aggregate quantity of crude oil available to meet refiners' aggregate demands is neither diminished nor augmented by subsequent equal barrel exchanges of crude oil. A refiner in the long run cannot satisfy its demand for additional crude oil for its refinery by exchange since it usually must deliver an amount of crude oil equal to what it receives on exchange.

12. The three-cut exchange was developed in California as a method of accounting for the exchange of crude oils of widely different qualities and characteristics and mixed or commingled in pipelines. Significant volumes of crude oils of widely varying characteristics are produced in close proximity in California. These different characteristics include not only API gravity and sulfur content but many other characteristics important to a refiner, including distillation yield. The distillation yield of a crude oil tells a refiner how much of the various types of petroleum products (generally, gasoline, diesel fuel and fuel oil) it will get from refining the particular crude oil in the most common refining process, a primary distillation unit. Two California crude oils of identical API gravity and produced within ten or twenty miles of each other can have very different chemical compositions and thus very different distillation yields.

13. The three-cut exchange accounts for crude oil on the basis of distillation yields. Its use facilitates exchanges

of crude oil even when disparate qualities of crude oils are commingled in pipelines by assuring a refiner that it will receive credit for crude oil for the same hydrocarbon content as it gives up in the exchange. Three-cut exchanges have been useful in a variety of locations and situations where a refiner has acquired or produced a particular quality of crude oil and wants to be assured that its refinery will have access to equivalent quality crude oils based on distillation yields.

14. Three-cut exchanges were in use in California as early as 1932. The wide range of crude oil types invited a method of accounting for the qualities of crude oils relative to each other based on product yield. The use of three-cut exchanges increased substantially during World War II and thereafter have been consistently in use in California.

15. The State Lands Commission and the City of Long Beach investigated defendants' use of three-cut exchanges. They concluded that defendants' use of three-cut exchanges did not provide a basis for a claim of "added value" under Article 9(c) of the Contractor's Agreement.

16. All defendants except Exxon have been subject to a consent decree approved by this Court in 1959, which expired in 1974. *United States v. Standard Oil Company of California*, 1959 [CCH] Trade Cases ¶ 69,399 (S.D. Cal. 1959). The consent decree, which was entered after years of discovery in which the defendants' exchanges were thoroughly examined, permitted defendants to continue the use of three-cut exchanges.

17. In 1961-62 a series of meetings occurred among various employees in the crude oil supply departments of Mobil, Union, Tidewater (now Getty), Texaco, Socal, Richfield (now Arco) and Shell for the purpose of discussing the technical specifications of three-cut exchanges. Common technical specifications for the cuts were neces-

sary if multi-party book transfers, the most efficient means of monitoring cut balances, were to be used. The existing definitions and specifications of the cuts failed to account accurately for certain fractions of crude oil that had become of increased importance in light of changes in the petroleum product market on the West Coast. The participating refiners had different concerns about the existing definitions and specifications, which reflected the needs of their particular refineries. At the times of the meetings, some of the refiners had installed downstream processing units, such as coking and cracking units, to process lighter products from the heavy part of the barrel which used to be sold as fuel oil. Other refiners had not yet installed such processing units.

18. Many different proposals were advanced, studied, debated and discussed during the five meetings over the course of a year. The principal changes discussed were that Cut 2 should be defined by distillation at 550° endpoint and that Cut 3 should be the remainder. Most companies favored adjustment for Cut 3 to a standard API gravity of 16° to facilitate book transfers. At the fifth meeting Mobil proposed a volumetric adjustment to Cut 3 API gravity 16° on the basis of specific gravity.

19. Subsequent to the fifth and final meeting all companies amended most of their three-cut exchange agreements to incorporate the new specifications of the cuts, including a volumetric adjustment to Cut 3 using specific gravity. The specific gravity method was one of two methods proposed at the meetings of volumetrically adjusting Cut 3 to a base gravity of 16° API to facilitate book transfers.

20. The changes in the technical definitions of Cut 2 and Cut 3 affected each company somewhat differently on the basis of their different refinery configurations.

21. Over time, the specific gravities of the crude oil received and delivered tended to balance out. The specific

gravity adjustment provided a common basis for making an adjustment to 16° which facilitated book transfers and the balancing of crude oil exchanges among the participants without the need for negotiating settlements or delivering products.

DATED: OCTOBER 17, 1984

/s/ William P. Gray
WILLIAM P. GRAY
United States District Judge

APPENDIX F

Pursuant to Sup. Ct. R. 28.1, petitioners include the following list of parent companies, subsidiaries (except wholly owned subsidiaries), and affiliates of each corporate petitioner:

MOBIL OIL CORPORATION

ABORAY PTY LIMITED
ABU DHABI PETROLEUM COMPANY LIMITED
ACE POLYMER CO., LTD.
ADRIA WIEN PIPELINE GESMBH
AIMCO (ALPHA) SHIPPING COMPANY
AIMCO (OMEGA) SHIPPING COMPANY LTD.
AIRCRAFT FUEL SUPPLY B.V.
AIRTANKDIENST KOELN
AK CHEMIE GMBH & CO. KG
AKAUMA ASPHALT INDUSTRIES, LTD.
ALEXANDROUPOLIS PETROLEUM INSTALLATION S.A.
ALPHA-ALET VE DAYANIKLI TUKETIM MAMULLERI PAZARLAMA A.S.
ALTONA PETROCHEMICAL COMPANY LIMITED
AMMENN GMBH
ANDREWS OIL PTY. LIMITED
ANKARA GAZ SATIS A.S.
ARABIAN AMERICAN OIL COMPANY
ARABIAN CHEMICAL TERMINALS
ARABIAN INTERNATIONAL MARITIME COMPANY
ARABIAN INTERNATIONAL MARITIME COMPANY LIMITED
ARABIAN SHIPPING & TRADING CO. S.A.
ARABIAN TRADING CO. S.A.
ARAL AKTIENGESELLSCHAFT
ATAS ANADOLU TASFIYEHANESI A.S.
ATLAS SAHARA S.A.
AUSTRALIAN SYNTHETIC RUBBER CO LIMITED
AUTOBAHN-BETRIEBE GESELLSCHAFT MBH

AVIATION FUEL SERVICES LIMITED
AYGAZ A.S.
BALGEE OIL PTY. LIMITED
BANGKOK AVIATION FUEL SERVICES LIMITED
BAYERISCHE ERDGASLEITUNG GMBH
BAYERISCHE MINERAL-INDUSTRIE AG
BEER GMBH
BEER GMBH & CO. MINERALOEL-VERTRIEBS-KG
BIN SULAIMAN MOBIL TOWERS
BUFFALO RIVER IMPROVEMENT CORPORATION
BUTEY SARL
CANADIAN SUPERIOR OIL (AUST.) PTY. LTD.
CANNER'S STEAM COMPANY, INC.
CANYON REEF CARRIERS, INC.
CARBURANTI, LUBRIFICANTI E AFFINI MERIDIONALI—CLEAM S.P.A.
CARPI GAS S.R.L.
CAS (COMBINED AUTOMATION SYSTEM) B.V.
CEED DESIO S.R.L.
CELMISIA SHIPPING CORPORATION
CENTRAL AFRICAN PETROLEUM REFINERIES (PRIVATE) LIMITED
CERCERA SA
CHANGI AIRPORT FUEL HYDRANT INSTALLATION PTE. LTD.
CHARBONNIERE DE MASSY—PIERRE MARIE
COBAR PTY. LIMITED
COLLINS PIPELINE COMPANY
COLOMBIANOS DISTRIBUIDORES DE COMBUSTIBLES, S.A. "CODI"
COLONIAL PIPELINE COMPANY
COMBUSTIBLES COLMERAUER
COMET BRENNSTOFFDIENST GMBH
COMMERCIAL POLYMERS PTY. LIMITED
COMMODORE MARITIME COMPANY S.A.
COMPAGNIE AFRICAINE DE TRANSPORT CAMEROUN (CAT.CN)
COMPAGNIE D'ENTREPOSAGE COMMUNAUTAIRE

COMPAGNIE DES PETROLES PRIMAGAZ
COMPAGNIE REGIONALE DE DISTRIBUTION DE PRODUITS PETROLIERS (CO.RE.DIS)
COMPAGNIE SENEGALAISE DES LUBRIFIANTS
COMPANIA DE LUBRICANTES DE CHILE LIMITADA (COPEC MOBIL LTDA.)
COMPANIA MEXICANA DE ESPECIALIDADES INDUSTRIALES, S.A. DE C.V.
CONSORTIUM RAYMOND DUEZ
COOK INLET PIPE LINE COMPANY
CORCOP
CRC LYON CHAUFFAGE
CRCP
CYPRUS PETROLEUM REFINERY LIMITED
DEBA S.R.L. INDUSTRIA PETROLIFERA
DEPOSITI GENOVESI S.P.A.
DEPOT PETROLIER DE MOUREPIANE
DEPOT PETROLIER DU GRESIVAUDAN
DEPOTS DE PETROLE COTIERS
DEPOTS PETROLIERS DE LA CORSE (DPLC)
DEUTSCHE PENTOSIN-WERKE GMBH
DEUTSCHE TRANSALPINE OELLEITUNG GMBH
DICOMI S.R.L.
DIXIE PIPELINE COMPANY
DUKHAN SERVICES COMPANY W.L.L.
DUPONT & DEWULF N.V.
EAST TEXAS SALT WATER DISPOSAL COMPANY
ENERGAS S.R.L.
ENERGIE ALPES
ENERGIE NORD DISTRIBUTION
ENTREPOT PETROLIER DE MULHOUSE
ENTREPOT PETROLIER DE NANCY
ENTREPRISE ALEXANDRE VIDAL
ENTREPRISE JEAN LEFEBVRE
ERDGAS-VERKAUFS-GESELLSCHAFT MBH
ERDOEL-RAFFINERIE NEUSTADT GMBH & CO. OHG
ERDOL-LAGERGESELLSCHAFT M.B.H.

ETABLISSEMENTS BOUTHENET
ETABLISSEMENTS JOSEPH WALLACH
ETABLISSEMENTS ROHRMANN DUPOSSE
ESTABLISSEMENTS STARCK & CIE
ETS. LATHUILLERE
EUROPETROL S.P.A.
FAIRWIND MARITIME COMPANY S.A.
FELIX OIL COMPANY
FIAMMA LAZIALE S.P.A.
FIBIL SA
FILTROS DE COSTA RICA, S.A.
FIOUL ASSISTANCE SERVICE
FRUEHMESSER GMBH
FRUEHMESSER MINERALOLHANDELS GMBH & CO. KG
FUSO OPERATIONS KABUSHIKI KAISHA
GATWICK REFUELLING SERVICES LIMITED
GAZAL-GAZ ALETLERI A.S.
GEOMINES-CAEN
GEOVEXIN
GHANA BUNKERING SERVICES LIMITED
GUZZARDI PETROLEUM (GIPPSLAND) PTY. LIMITED
HANIEL HANDEL GMBH
HEIZOL-HANDELSGESELLSCHAFT MBH
HELLAS GAS STORAGE CO. S.A.
HYDRANTEN-BETRIEBS-GESELLSCHAFT FLUGHAFEN/FRANKFURT
IMBERT G. DISTRIBUTION DE PRODUITS PETROLIERS
INDUSTRIA INTERAMERICANA DE FILTROS LTDA. "INTERFIL"
INTO PLANE SERVICES—I.P.S.—S.R.L.
INTOPLANE SERVICES COMPANY LIMITED
IRANIAN OIL PARTICIPANTS LTD.
IRANIAN OIL SERVICES (HOLDINGS) LTD.
IRANIAN OIL SERVICES LIMITED
IRAQ PETROLEUM COMPANY LIMITED

IRAQ PETROLEUM PENSIONS LIMITED
ISIDE S.P.A.
ISTANBUL PETROL VE MAKINA YAGLARI LTD. STI.
ITALOIL S.R.L.
JAPAN AIRPORT FUELING SERVICE COMPANY, LTD.
JECOP
JET AVIATION SAUDI ARABIA COMPANY LIMITED
JOLLY GAS LAZIALE S.R.L.
K.K. NIPPATSU
K.K. SANKYO PLASTICS
K.K. TORESEN
KANSAI PETRO-TERMINAL CO., LTD.
KANTO KYGNUS SEKIYU HAMBAI K.K.
KARL STORZ GMBH & CO. KG
KAWASAKI KYGNUS SEKIYU HAMBAI K.K.
KEIYO SEA-BERTH COMPANY, LTD.
KELINDA PTY. LIMITED
KLAUS KOEHN GMBH
KLAUS KOEHN GMBH & CO. MINERALOEL KG
KUEBLER HEIZOL A.G.
KUMOSAR S.R.L.
KURT AMMENN GMBH & CO. KG
KYGNUS EKKA GAS KABUSHIKI KAISHA
KYGNUS KOSAN KABUSHIKI KAISHA
KYGNUS MARKETING SERVICE K.K.
KYGNUS SEKIYU KABUSHIKI KAISHA
KYOKUTO PETROLEUM OVERSEAS, LTD.
KYOKUTO SEKIYU KOGYO KABUSHIKI KAISHA
LA CENTRAFRICAINE DES PETROLES
LES NOUVEAUX COMPTOIRS PETROLIERS
LIPET-LIKIT PETROL GAZI VE YAKIT TICARET A.S.
LUBLEND LIMITED
LUBRICANTES DEL SUR, S.A.
MARCEAUX & CIE

MARS-MILAN AIRPORT REFUELLING SERVICE S.R.L.
MATCO TANKERS (U.K.) LIMITED
MEENTZEN & FRANKE GMBH & CO.
MERITRANS S.P.A.
MERTL GMBH
MID STATE PETROLEUM PTY. LIMITED
MINERALOEL-HANDELS-GESELLSCHAFT MBH
MINERALOELWERK WEDEL GMBH & CO. OHG
MOBIL CATALYSTS CORPORATION OF JAPAN
MOBIL CORPORATION (Parent)
MOBIL KOREA LUBE OIL, INC.
MOBIL MOTOR REST SA
MOBIL OIL DE MEXICO, S.A. DE C.V.
MOBIL OIL FRANCAISE
MOBIL OIL GABON
MOBIL OIL GHANA LIMITED
MOBIL OIL MAROC
MOBIL OIL NIGERIA LIMITED
MOBIL POLYMERS INTERNATIONAL SARL
MOBIL PRODUCING CAMEROON INC.
MOBILGAZ MOBIL PETROL GAZLARI A.S.
MOTEL REST SA
MT. MARROW BLUE METAL QUARRIES PTY. LIMITED
N.V. ROTTERDAM-RIJN PIJPLEIDING MAATSCHAPPIJ
N.V. SOCONY-STANDARD-VACUUM OIL COMPANY (PETROLEUM MAATSCHAPPIJ)
NEAR EAST DEVELOPMENT CORPORATION
NEW ZEALAND SYNTHETIC FUELS (HOUSING) CORPORATION LIMITED
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NICHIMO OIL (BERMUDA) CO., LTD.
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PALOMA PIPE LINE COMPANY
PARS INVESTMENT CORPORATION (PRIVATE COMPANY)
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PETROCAM PTY. LIMITED
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SAUDI MARITIME COMPANY LTD.
SAUDI TANKERS LIMITED
SAUDI YANBU PETROCHEMICAL CO.
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SOCIETE DE MANUTENTION DE CARBURANTS AVIATION DAKAR-OFF
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SOCIETE TAHITIENNE DES OLEODUCS (STDO)
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SOUTH SASKATCHEWAN PIPE LINE COMPANY
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ROYAL DUTCH PETROLEUM COMPANY (CO-PARENT OF SHELL PETROLEUM)
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THUMS LONG BEACH COMPANY
EAST TEXAS SALT WATER DISPOSAL COMPANY
GRANDE ECALLIE LAND COMPANY, INC.
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EXPLORER PIPELINE COMPANY
LOCAP, INC.
OLYMPIC PIPE LINE COMPANY

PLANTATION PIPE LINE COMPANY
WEST SHORE PIPE LINE COMPANY
WOLVERINE PIPE LINE COMPANY
LONE STAR POLYMER CONCRETE CORPORATION
GENERAL HYDROCARBON POLYMER CONCRETE INC.
POLYCON RESEARCH, INC.
MORRISON MOLDED FIBER GLASS COMPANY
PREMIX/E.M.S. INC.
KNYTEX, INC.
GLASTRUSIONS, INC.
GLASS-STEEL, INC.
HUNTSMAN CHEMICAL COMPANY
LUCKY CHANCE MINING COMPANY, INC.
GEORGE NEUMAN AND COMPANY
UNITED SCIENTIFIC, INC.
A. T. MASSEY COAL COMPANY, INC.

CHEVRON CORPORATION

(formerly Standard Oil Cmopany of California)

CHEVRON CORPORATION (PARENT)
CANYON REEF CARRIERS, INC.
CHEVRON CAPITAL, N.V.
CHEVRON CAPITAL U.S.A. INC.
CHEVRON INVESTMENT MANAGEMENT COMPANY
CHEVRON OIL FINANCE COMPANY
FELIX OIL COMPANY
GULF OIL FINANCE N.V.

UNION OIL COMPANY OF CALIFORNIA

UNOCAL CORPORATION
(PARENT OF UNION OIL)
UNION EXPLORATION PARTNERS, LTD.
UNOCAL THAILAND, LTD.
MIDWEST 76, INC.

(2) (2)

Nos. 89-987, 89-990

Supreme Court, U.S.
FILED
JAN 25 1990
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1989

STANDARD OIL COMPANY OF CALIFORNIA, et al.,
Petitioners,

VS.

THE CITY OF LONG BEACH and
THE STATE OF CALIFORNIA,
Respondents.

EXXON CORPORATION and TEXACO INC.,
Petitioners,

VS.

THE CITY OF LONG BEACH, et al.,
Respondents.

RESPONSE TO PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

This case does not raise the questions posed by petitioners. The issue is whether the Court of Appeals erred in holding that triable issues of fact foreclosed summary judgment in this antitrust case charging petitioners with a successful conspiracy to fix prices when respondents produced *direct* evidence that:

1. petitioners completely controlled the relevant market;

2. all petitioners, except Exxon, expressly agreed on secret formulae fixing the prices at which they exchanged crude oils carried on their proprietary crude oil pipelines; Exxon joined its co-petitioners in performing that agreement from which no petitioner deviated during the relevant years;

3. petitioners' published ("posted") prices paid to respondents and to other independent producers of crude oil were significantly lower than the prices petitioners paid to each other for identical crude oils using their secret price formulae;

4. petitioners never competed with each other in trading crude oil on their exchange market or in the public market even in times of acute shortage of crude oil;

5. all petitioners engaged in other anticompetitive conduct affecting price, including the rigging of prices for Alaska crude, for the avowed purpose of protecting their artificially depressed posted prices for California crude oils;

6. respondents produced both direct and circumstantial evidence that petitioners' purpose was to fix higher prices for crude oils traded with one another and lower prices for crude oils bought from respondents and that the price fixing agreement enabled petitioners to pay respondents nearly $1 per barrel less than the competitive price for crude oil they extracted under their 35-year contract with respondents.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
Introduction	1
Essential Characteristics Of The Relevant Market	4
THE PRICE-FIXING AGREEMENT	7
A. Events Leading To Development Of The 1962 Agreement	7
B. The Secret Meetings Of The "Exchange Committee"	7
C. The 1962 Agreement Fixed The Price Of Crudes Traded In The Exchange Market	9
D. The Formulae Insulated Posted Prices From Competitive Market Forces And Permitted Petitioners To Maintain Depressed Posted Prices	10
E. Secrecy Was Crucial To Two-Tier Pricing	13
F. Petitioners Understood The Purpose And Effect Of Their Formulae	14
G. Rigging Alaska Posted Prices Preserved The Benefits Of The California Price Fix	15
H. Petitioners' Price Signalling Helped Maintain Depressed Posted Prices	15
I. All Of The Petitioners Had Incentives To Fix Low Posted Prices	16
A. Texaco	17
B. Exxon	19
PETITIONERS' EXPLANATIONS OF THE 3-CUT EXCHANGE ARE CONTRADICTED BY THE RECORD	21
RESPONDENTS PRIMA FACIE PROVED THE CONSPIRACY	23

TABLE OF CONTENTS

	Page
REASONS FOR DENYING THE PETITIONS	23
A. Triable Issues Of Fact Foreclosed Summary Judgment	24
B. Respondents' Evidence Of Conspiracy Was Direct, Not Only Circumstantial	24
CONCLUSION	29

TABLE OF AUTHORITIES

Cases

Page

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) ... 24

Arizona v. Maricopa County Medical Society, 457 U.S. 332 (1982) 21, 25

Broadcast Music, Inc. v. CBS, 441 U.S. 1 (1979) 23

Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717 (1988) 12

Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643 (1980) 21, 25

Continental Ore Co. v. Union Carbide Corp., 370 U.S. 690 (1962) 26

Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977) 12

Dunnivant v. Bi-State Auto Parts, 851 F.2d 1575 (11th Cir. 1988) 28

Federal Trade Comm'n v. Superior Court Trial Lawyers Ass'n, ____ U.S. ____, Supreme Court Docket Nos. 88-1198, 88-1393 (Jan. 22, 1990) 21, 29

Helicopter Support Systems v. Hughes Helicopter, 818 F.2d 1530 (11th Cir. 1987) 28

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S.574 (1986) 2, 24, 27, 28

McCabe's Furniture, Inc. v. La-Z-Boy Chair Co., 798 F.2d 323 (8th Cir. 1986), *cert. denied*, 108 S.Ct. 1728 (1988) 28

Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984) 27

National Society of Professional Engineers v. United States, 435 U.S. 679 (1978) 21

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Ryko Mfg. Co. v. Eden Services, 823 F.2d 1215 (8th Cir. 1987), *cert. denied*, 484 U.S. 1026 (1988) 28

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TABLE OF AUTHORITIES

CASES

Page

United States v. McKesson & Robbins, Inc., 351 U.S. 305 (1956) 25

United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) 9, 21, 22, 25, 29

United States v. United States Gypsum Co., 438 U.S. 422 (1978) 16

Zenith Radio Corp. v. Hazeltine Research, 395 U.S. 100 (1969) 26

Statutes

Clayton Act, § 4 26

Sherman Act, § 1 ..... 2, 22, 29

California Civil Code § 2168 5

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§ 211 5

§ 228 5

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E. Gellhorn, *Antitrust Law and Economics* 77-78 (1976) .. 12

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Nos. 89-987, 89-990

In the Supreme Court

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United States

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vs.

THE CITY OF LONG BEACH, et al.,
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RESPONSE TO PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondents respectfully request that a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit be denied.

Respondents agree with the jurisdictional statement and the statutes involved as stated by petitioners.

STATEMENT OF THE CASE

Introduction

Respondent, City of Long Beach ("Long Beach"), as both oil field proprietor and trustee for respondent State of California, holds the mineral rights to the greater portion of the Wilmington oil field, one of California's largest crude oil fields.[1]

In 1965, Long Beach, acting for itself and as trustee for the State of California, opened for bidding the total production of Tract No. 1, the lion's share of the Wilmington oil field. ER 823. Texaco, Humble (now Exxon), Union, Mobil and Shell successfully bid for the Field Contractor's share of the total production of Tract No. 1. Under the 35-year "Contractors' Agreement", the joint venture assumed the right and obligation (1) to operate the field for respondents on a day-to-day basis and (2) to buy 80 percent of the total crude production, subject to "sell-off" provisions.[2] After lengthy negotiations and public hearings, an elaborate pricing provision was negotiated to assure that respondents would receive competitive market prices.[3]

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[1] Before production commenced under contracts with the petitioners, the total recoverable reserves exceeded one billion barrels of crude oil. ER 1052 (Unless stated otherwise all "ER" cites are to the excerpt of record in Ninth Circuit Appeals Nos. 86-5859 and 86-5860).

[2] Ninth Circuit appeals Nos. 87-6301 and 87-6628 ("*Long Beach I* Contract") Excerpt of Record, ER 799 ¶ 6, 342.

[3] ER 3731-35. The pricing provision is Article 9 of the Contractors' Agreement, which became effective April 1, 1965. *Long Beach I* Contract ER 556-68. Socal and ARCO were also parties.

Respondents filed their antitrust claims in 1975 charging petitioners and former defendant Atlantic Richfield Company ("ARCO")[4] with conspiring to fix prices they paid for respondents' crude oil from 1971 to 1975 (later through 1977). The case was pretried for a decade during which petitioners filed 16 summary judgment motions. On June 19, 1985 the district court entered a two-paragraph summary judgment dismissing the antitrust claims. Three months later, that court issued a memorandum decision revealing that it had weighed the evidence, resolved conflicts in the evidence against respondents and decided issues of credibility in petitioners' favor.[5] Respondents appealed and the Court of Appeals reversed holding that triable issues of fact foreclosed summary judgment. Petitions for rehearing and suggestions for rehearing *en banc* were denied on September 22, 1989.[6]

Contrary to petitioners' contentions, proof of the conspiracy did not rest only on circumstantial evidence, and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) is inapplicable.

Petitioners' brief completely ignores the abundant evidence produced by respondents in opposition to their summary judgment motions that *prima facie* established every element of their § 1 conspiracy case. Instead, they argue as if the district court's findings were made in a non-jury case following a trial on the merits.

Respondents introduced *direct* evidence that:

1. The petitioners, together with Getty and former defendant ARCO, were the "Majors", who together controlled the relevant market as transporters and refiners of crude oil, supposedly in

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[4] ARCO settled with respondents in 1984.

[5] The memorandum decision is set forth in Socal petitioners' App. C. An earlier decision denying summary judgment is set forth as App. D to Socal petitioners' brief. No additional evidence was produced by petitioners in the interim.

[6] The order denying rehearing is annexed to Socal petitioners' brief, App. B.

horizontal competition with one another at the production, transportation, refining and marketing levels of the petroleum industry;

2. Standard Oil Company of California ("Socal"), Mobil Oil Corporation ("Mobil"), Shell Oil Company ("Shell"), Union Oil Company of California ("Union"), Texaco Inc. ("Texaco"), former defendant ARCO and non-defendant Getty Oil Company entered into an express agreement, negotiated in 1961-62, to trade crude oils ("crude") with each other over their interconnected proprietary pipelines using secret 3-cut exchange formulae setting prices nearly $1 per barrel higher than those they publicly announced ("posted") and paid to respondents and to other independent California producers for the identical oil they exchanged;[7]

3. The Majors' 3-cut exchange agreement had an immediate depressing effect on posted prices. Thereafter, and throughout the relevant years, posted prices for heavy California crudes remained flat despite gross changes in supply and demand;

4. The Majors, price posters and non-posters alike, zealously adhered to a policy never to pay higher than posted prices to independent producers and never to bid against each other for crude on the basis of price even when experiencing severe shortages of California crudes for their refineries;

5. The Majors regularly shared advance pricing and other sensitive proprietary information; and

6. The Majors rigged the prices for Alaska crudes in order to maintain the depressed prices for competing California crudes.

Contrary to petitioners' argument, respondents have not relied on the doctrine of "conscious parallelism" to establish their *prima facie* case because their direct evidence was more than sufficient

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[7] ER 426, Finding 19. Texaco withdrew from the negotiating sessions before the last meeting on advice of counsel, but shortly after the 1962 agreement it rejoined the conspiracy and traded crudes on 3-cut exchanges under the new rules. Exxon Corporation ("Exxon", formerly "Humble") joined the other petitioners in the scheme in the late 1960's when it began trading on 3-cut exchanges.

to demonstrate concerted action to fix prices. Although certain language in the opinion of the Court of Appeals is inartistic, that Court unmistakably recognized that respondents' evidence *prima facie* proved petitioners' price-fixing agreement, that all petitioners performed that agreement and that the scheme succeeded in depressing prices paid for respondents' oil.

Some knowledge of the unique characteristics of the relevant market is necessary to an understanding of this price-fixing scheme and why it worked for so many years.

Essential Characteristics Of The Relevant Market

The geographical market is California, which was isolated from the other U.S. refining areas because crude oil pipelines did not connect California with other districts.[8]

The Majors not only dominated the relevant market, they *were* the market. Aside from some small independent refiners, the Majors were the vertically integrated refiners, crude transporters, buyers and sellers of refined petroleum products in California. Before Exxon entered the California refining market, the Majors combined owned 90 percent of the refining capacity, controlled almost all the tanker terminal facilities and, with minor exceptions, owned all of the crude oil pipelines.[9] All of them were members of the "pipeline club".

The key element in the creation and successful maintenance of the price-fixing scheme is the lack of common carrier crude oil pipelines in California. The pipelines were all privately owned by the Majors and operated as proprietary carriers. The lack of common carrier pipelines was unique to California.[10]

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[8] ER 2572A, 862.

[9] ER 784, 862, 888A. These figures include Phillips and Getty, which were at various times integrated petroleum firms in the 1960's.

[10] ER 862, 888A.

The pipeline owners were well aware of the market power the proprietary pipelines created.[11] In an attempt to prevent the pipelines from becoming common carriers under California law, pipeline owners passed title to the crude in transit under exchange agreements.[12]

The interconnected crude pipelines were operated as an integrated system by which the Majors moved huge volumes of crude through each other's pipelines. Lack of access to the system would have put a refiner at an enormous competitive disadvantage.[13] No Major by itself had sufficient pipeline capacity to serve its refineries. Texaco had only 5 percent of total pipeline capacity and considered itself "at the mercy of other companies in the transporting of our crude oil supplies".[14] Exxon owned no trunk pipelines.[15] The Majors were, therefore, interdependent.

The Majors had a policy of denying pipeline access to all independent crude producers. ER 2490. Such producers had to sell their crudes to pipeline owners at artificially depressed posted prices. Pipeline control prevented competition at the wellhead.[16]

Posted prices are publicly announced prices a refiner will pay producers in an oil field. Prices are announced for each field

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[11] ER 1502, 886, 1253, 1236, 2932-34. "[W]e are quite limited in owned pipeline and tanker facilities and dependent on our competitors for the transportation of the major portion of our West Coast crude . . . ." ER 1258. See also ER 1255.

[12] Cal. Civ. Code § 2168; Cal. Pub. Util. Code §§ 211, 228; ER 2490.

[13] ER 865, 1054.

[14] ER 1253, 4226.

[15] ER 862, 3301.

[16] ER 886 [Exxon document] ("[A]nother important factor that contributes to control of prices by the large purchasers is the absence of common carrier pipeline facilities. This reduces the producers flexibility in marketing his production."); ER 865 ("[P]roducers in California have been unsuccessful in establishing higher crude prices because of lack of controlled outlet, due in no small part to crude oil pipeline ownership by the majors.")

separately by degrees of gravity using a scale established by the American Petroleum Institute ("API"). The heavier the crude, the lower is the API gravity number and its price, and vice versa. These price differences are called "gravity price differentials" ("GPD") or "gravity penalties". Posted prices are supposed to reflect the fair market value for the crude oil. *Long Beach I* Contract ER 604 ¶ 22. During the 1962-65 contract negotiations, petitioners repeatedly assured respondents that posted prices represented the "true market price" of the crude oil.[17] Petitioners induced respondents to adopt a pricing provision drafted by Socal which used petitioners' postings as the central pricing mechanism.[18]

Socal, was the price leader, and the other posters followed its lead; non-posters adhered to posted prices.[19]

During the relevant years, the posted gravity penalty for respondents' heavy crude was generally 7 cents per degree API per barrel[20] but everywhere else in the country the prevailing gravity penalty was only 2 cents.[21]

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[17] *Long Beach I* Contract ER 589, 700, 681, 650, 585.

[18] *Long Beach I* Contract ER 648, 655, 660.

[19] ER 4126-29, 4147-48, 2924. *Long Beach I* Contract ER 744. Except for temporary aberrations, posted prices were uniform. *Long Beach I* Contract ER 743-44.

[20] ER 2540, *i.e.*, for each degree API Wilmington crude declined, the posted price fell 7 cents per barrel (42 gallons).

[21] ER 2446. A senior East Coast Shell crude supply executive wrote: "[C]ontrary to all principles of sound economics and equity (a) we have artificially maintained dual crude oil price standards in the U.S.—high for EOR [east of the Rockies] and low for WOR [west of the Rockies], (b) furthermore the WOR price structure has been distorted (that is, the gravity gradient) by the action of a few large majors WOR because the remaining segment of industry, including Shell, neglected to exercise its proper influence in the market place...." ER 2214. [Bracketed material added].

THE PRICE FIXING AGREEMENT

A. Events Leading To Development Of The 1962 Agreement

By the early 1960's improved refining technology made it possible to refine increasingly higher percentages of gasoline and other valuable light products from heavy crudes. ER 2053. The Majors' old exchange system no longer accurately accounted for crude values, and they could not agree on settlements of their exchange account imbalances.[22] By the early 1960's, the Majors knew that heavy crudes were especially underpriced.[23] A Major buying heavy crude at posted prices did not want to exchange it for a lighter crude at posted prices because it would thereby lose the benefit of underpricing of the heavy crude.[24] The Majors either had to abandon their old system and post competitive prices or radically alter the rules for pricing on exchanges. They chose the latter course.[25]

B. The Secret Meetings Of The "Exchange Committee"

During 1961-62, the Majors (excluding Exxon which had not yet entered the market) held five secret meetings to revise the system. Participants in the "Exchange Committee" meetings were crude supply managers of the Majors, including Getty and former defendant ARCO. Their purpose was to create a new mechanism for exchanging the Majors' crudes at prices more nearly reflecting their actual values.[26]

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[22] ER 1235, 1237, 2486, 2487, 2488, 3055, 3724-25.

[23] ER 2485. By 1961, the underpricing had become so severe that a Socal executive warned of adverse legal repercussions. ER 2031. By 1962, heavy crudes which were posted at about $2.50 per barrel, were underpriced by $1 per barrel. ER 1809.

[24] ER 1252, 1339, 2485.

[25] Huge volumes of crude moved on transportation exchanges and made exchange terms important to the Majors. The exchange market was large because enormous volumes of California crudes were carried by petitioners' pipelines. ER 4233-43.

[26] Numerous documents from petitioners' files reveal their purpose. ER 1339-43, 1252, 1235, 1237, 2486. A Mobil account of the final

Contemporary reports describe various methods considered for exchange pricing. The committee decided to retool the old 3-cut exchange system.[27] Devising a means for pricing "Cut 3" was an important and difficult problem because 60-70 percent of an average heavy crude is cut 3,[28] and it is in cut 3 that the most significant quality, i.e. gravity, differences among crude oils exist.[29] A club member trading away a crude which contained a significant amount of a more valuable, lighter residuum wanted to be compensated for receiving a less valuable, heavier residuum.[30] One proposal was to agree on so many cents in cash for each degree of difference in cut 3 gravities. That idea was quickly discarded because, if discovered, it transparently exposed the disparity between posted and exchange prices, and its price-fixing character was obvious.[31]

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meeting stated that the revision was agreed upon because "it was unanimously felt that an improved 3-Cut method was the most beneficial and equitable approach to the problem in view of disparities in California crude postings. . . .", i.e., posted prices did not reflect value of the crudes to the refiner. ER 1339.

[27] ER 1240-46, 1339-41. A "cut" is a distillation yield. The "cut" points are temperatures at which products are distilled from crudes in a laboratory test. Under the new 3-cut exchange rules adopted in 1962, "cut 1" is the product distilled by 400° F. It is essentially unfinished gasoline. "Cut 2" is the product distilled between 400° F and 550° F. It is essentially stove oil. "Cut 3" is the "residuum" and is similar to bunker fuel oil. ER 2189. In a sophisticated refinery, residuum can be further refined into lighter products using cokers and other advanced refining equipment. ER 1371.

[28] The cuts only exist on paper as a pricing and accounting mechanism. Physical cuts were not traded because sophisticated refineries do not produce them. Only whole crudes are transported on the pipelines. ER 2480, 1229, 2488, 1219.

[29] ER 4207. Cuts 1 and 2, were not considered to vary greatly in quality and so were fungible under the adopted formulae.

[30] ER 1188, 2459.

[31] ER 2168. Shell's counsel advised Shell's Exchange Committee representative that a general agreement on a gravity price differential should be avoided. ER 2220.

A more inscrutable proposal by Mobil was eventually accepted by the Exchange Committee. Cut 3 gravity differences were translated into a fictitious volume adjustment under a formula based upon specific gravities of cuts 3. The higher the gravity, the higher the cut volume credited. ER 2170.[32] The cut 3 volumes credited on petitioners' books translated into a price. ER 3825, 419. When the formula is decoded, the gravity penalty for cut 3 is about 2 cents per degree API.[33] The code became the price-fixing system used by all petitioners throughout the relevant years.

C. The 1962 Agreement Fixed The Price Of Crudes Traded In The Exchange Market

The formulae permitted the Majors to use a gravity penalty of about 2 cents instead of the 7 cent posted penalty. The agreement eliminated competition among the Majors in the determination of crude prices in the exchange market.[34] The formulae did not, as petitioners argue, reflect different Majors' refining values. As ARCO put it: "It is desirable that all companies agree on a single value differential to be applied to all crudes." ER 1191. And agree they did. The formulae set the exchange market price, not competitive bidding among refiners based on their estimates of their refining values. The pact was a naked price-fixing agreement among horizontal competitors. As this Court stated in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 222-23 (1940): "[P]rices are fixed . . . if by various formulae they are related to the market prices. They are fixed because they are agreed upon." Crude oil exchange prices in California were agreed upon in 1962 and for at least 15 years thereafter. A Shell official in New York, unaware of the purpose of the scheme, commented on the "frantic lengths [to which] some people will go to avoid using the

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[32] Adjustments in cut 3 volumes were made on trading partners' books of account. The volumetric adjustment of cuts 3, and agreed equality for all cuts 1 and 2, fixed the value of whole crudes traded on 3-cut exchanges.

[33] ER 2171, 2507.

[34] A 1970 Mobil document crisply stated the impact of the formulae: "[I]n the Texaco [pipeline] system we would be buying gravity at less than 2 cents/barrel/° API. . . ." ER 1771-72.

U.S. dollar as the medium of exchange." He added, "[o]f course if you have to deal with people who only deal in sea shells you will have to go along. . . ." He concluded: "Before accepting the specific gravity proposal [for adjusting gravity differences in cuts 3] would suggest you try to get one or more of the sponsors to . . . reconcile it with their crude oil price postings."[35]

D. The Formulae Insulated Posted Prices From Competitive Market Forces And Permitted Petitioners To Maintain Depressed Posted Prices

Petitioners removed crudes traded on 3-cut exchanges from the posted price market and created a two-tiered price structure for the same oil.[36] Petitioners eliminated competitive pressures to increase posted prices by setting exchange market prices through their secret agreement instead of negotiations among the exchange partners. As a result, prices in the public market were profoundly and anticompetitively affected. Absent agreement on exchange prices among members of the pipeline club, the Majors would have had to raise posted prices.

Respondents' economic experts concluded:

> Exchanges, bereft of the concealment afforded by three-cut accounting, would have to reflect posted prices. Unconcealed exchange premiums would quickly result in higher crude purchase prices. ER 4194.[37]

After the scheme was in place, the posted gravity penalties for heavy crudes almost never fluctuated despite major changes in supply and demand, and posted prices remained flat from 1963-

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[35] ER 2218. See also ER 3003-05, 2217, 3006, 2504.

[36] The Majors exchanged respondents' Wilmington crude among themselves on 3-cut exchanges *before* the oil ever left the oil field, *e.g.*, ER 1891-96, a 3-cut exchange between Socal and ARCO. See also ER 2070, 1070, 1080, 1124, 2999-3000, 3227- 29, 3231.

[37] *Accord*, ER 3416. ("[T]he effect of the three-cut exchange system was to restrain competition for California crude oil and to depress the prices paid for that oil in the field."); ER 3417, ER 414-15.

69.[38] The industry as a whole was in short supply of heavy crudes during most of the 1960's and 70's,[39] and severe actual shortages were acknowledged in many of petitioners' documents.[40] Nevertheless, petitioners never bid against each other nor deviated from posted prices.[41]

Respondents produced unrebutted expert testimony that 3-cut exchanges subverted competitive market forces in setting posted prices and created a two-tiered pricing structure for the same crude. This result could not happen in a competitive market, as Dr. Saving explained:[42]

> In a competitive industry each refiner will maximize profits by consuming each crude oil input up to the point that its marginal value equals the market price. If a refiner has a higher valuation for a crude than the market price, it will

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[38] ER 3854. For example, Exxon required large volumes of heavy crude for its Benicia refinery, yet from the day its refinery began operations, it both projected and experienced actual shortages of heavy crudes. Nevertheless, it failed to act competitively and to offer higher prices for additional supplies. ER 905, 908, 917, 923-25, 927, 930, 935, 937, 944, 981, 984-86, 2161.

[39] ER 935, 1098, 1509, 2199, 2918, 3095, 1723, 1153. Only in 1968 did Union use all of its crude distillation capacity. ER 3495 ¶ 19.

[40] *E.g.*, "Our own demand for U.S. heavy crudes cannot presently be satisfied. About 12,000 barrel capacity of our cokers are unloaded." ER 2397. "Domestic supply from current avails is no longer sufficient to meet running in California." ER 1260.

[41] ER 3147, 3158, 3297-98, 4314, 4315, 4318. Price competition was avoided as a matter of policy and was disparaged as "pirating oil". ER 3147, 3157-59.

[42] Dr. Thomas R. Saving, one of respondents' economic experts, also testified:

> It is not possible in a competitive equilibrium for a crude oil to have two different values. Where two values do persist over time, the only conclusion that can be drawn is that competition has been somehow restrained so that one of the values could be artificially maintained. ER 3707.

> expand its use until the value of the last (marginal) barrel used is equal to its price. ER 3706.[43]

Respondents' economists confirmed the opinions, expressed contemporaneously by defendants' personnel who bought, sold and traded crude oils,[44] that marginal refining values were highly relevant to the determination of a competitive market price and that posted prices bore no relationship to petitioners' refining values.[45]

Petitioners introduced no economic testimony in the district court and have no plausible explanation for the gross and persistent divergence between their marginal refining values and their posted prices.[46]

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[43] This principle is black letter economics. See E. Gellhorn, *Antitrust Law and Economics* at 77-78 (1976), a text cited with approval in *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988) and in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 51 n.18 (1977). See also III P. Areeda & D. Turner, *Antitrust Law* 156 (1978) and ER 479, 399-401.

[44] In a 1966 review of Union's postings a senior crude trader observed:

> [T]he ultimate objective in crude pricing would be to relate crude prices to refining value . . . crude prices in California have no relationship to value . . . the 5¢ to 7¢ price spread we have between gravities is wrong and . . . a consistent 3¢ spread appears about what it should be. ER 2240.

[45] Respondents' economists' study of 18,000 of petitioners' refinery values concluded that petitioners and the market did not act competitively. ER 3901-07. See also ER 479-80. Dr. Anderson testified:

> The continuing excess of value over price . . . constitutes by definition non-competitive market performance. ER 3416.

See also ER 3708, 3373-74, 3891-92.

[46] Petitioners confuse the issue by addressing average barrel values, which are irrelevant, rather than last barrel (marginal) values, which are crucial to economic analysis of market behavior. Socal Pet. at 5. Dr. Saving explained:

> When refiners behave competitively, refining value exceeds the cost of acquisition for each barrel *before* the last (marginal) barrel consumed. ER 3707 (emphasis supplied).

E. Secrecy Was Crucial To Two-Tier Pricing

Although posted price exchanges were well known, the fomulae from the 1962 meetings were kept secret for more than a decade. The code was initially cracked in 1974.[47]

When petitioners began purchasing respondents' crude under the Contractors' Agreement in 1965, ARCO insisted upon and received agreements to indemnify it as the pipeline owner if respondents discovered trading of Wilmington crude among Majors at values higher than posted prices and then adjusted prices under the "most favored nation" clause of the Contractors' Agreement.[48]

When this litigation began, the details of the code were gradually revealed by discovery. Some documents translated "sea shells" into cash. Petitioners also delivered refined products to reduce cut imbalances using ratios to convert the cuts to their closest refined product equivalents. Petitioners discussed the need for such settlements at the 1961-62 meetings and agreed on how they would work. ER 2165, 2482, 2464, 1241-43. *E.g.*, petitioners' documents showed that cut-2 imbalances were to be settled by delivery of stove oil on a ratio of 1:1.[49] Because market prices for refined products are published, the prices of cuts were revealed by the conversion ratios. Product settlements showed 3-cut exchange prices were much higher than posted prices.[50]

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[47] The "Rosetta Stone" was a Mobil-Union exchange cut imbalance settlement document inadvertently produced to respondent State at a routine annual audit of Mobil pursuant to the Contractors' Agreement. ER 2256, 1464, 3192. The letter, which was immediately confiscated by a Mobil representative, revealed that price posters Mobil and Union, in their 3-cut exchanges, had placed a value on crude oils in excess of $1 per barrel above posted prices. ER 3737 ¶ 13. Petitioners all adopted a posture of delay and obstructionism when respondents thereafter sought 3-cut exchange valuation data. ER 3714 ¶ 6. See also 3736-37 ¶¶ 11-12.

[48] ER 1070, 1080, 1124-26, 1895, 2069, 3000, 3228-31. Petitioners' secrecy prevented application of the most favored nation clause to adjust prices paid respondents to the higher exchange values. ER 3821.

[49] ER 2165, 1243.

[50] ER 2299, 2248, 2250, 1960, 1961.

F. Petitioners Understood The Purpose And Effect Of Their Formulae

Petitioners each internally discussed the purpose and effects of the formulae in terms of pricing of crude oil[51] and admitted that their purpose was to trade crudes at their true values to avoid posted prices.[52]

Their documents are replete with admissions that posted prices for heavy California crudes were "artificially maintained," "most improper," lacked appropriate "relationship to value," "wrong," "less than true value," "a problem" and "way out of line."[53]

Petitioners internally adjusted for the distortions when they used posted prices in their analyses,[54] *e.g.*, petitioners placed "premiums" above posted prices on the heavier crudes,[55] in order

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[51] ER 2189, 3219-21, 1361-62, 2218, 2077, 2217, 3038-39, 3151, 2171, 2276.

[52] A Mobil memorandum, called the "layman's guide" to 3-cut exchanges, listed as reasons for using such exchanges:

* * *

> (b) the disparity between the posted prices of heavy crudes in relation to light crudes
>
> * * *
>
> (d) crude pipelines are privately owned and operated and no major company has its own complete system to carry its own crudes. ER 1502.

See also ER 2306, 1233-34, 1339, 829, 3285, 2276, 2189, 1362.

[53] ER 2214, 2240, 2031, 1378. Mobil's West Coast Regional Manager for Crude and Product Supply wrote:

> One of the most improper situations existing relative to West Coast crude pricing is the matter of the 5 to 7¢ a barrel increments per degree of gravity. These increments should be no more than 3¢ a barrel and one day this situation will have to be corrected. ER 1378.

[54] ER 2417, 2297, 1981, 1993-94.

[55] ER 1981, 2240-41, 2485, 2231. One company called it "a bogey factor". ER 2231.

to make sound decisions about exploration, production and crude exchanges in the real world.[56]

G. Rigging Alaska Posted Prices Preserved The Benefits Of The California Price Fix

When light Alaska Cook Inlet crudes became available, petitioners faced a major problem because such crudes were primarily refined in California and thus competed directly with light California crudes. ER 1061, 1154-56. Petitioners knew that if they posted a two cent gravity penalty for such crudes, they could not expect to keep the prices of California crudes depressed. Those petitioners who posted prices in Alaska plus ARCO, therefore, knowingly adopted an artificially high 5 cent gravity penalty for light Alaska crudes in order not to "rock the boat" on their artificially high California gravity penalties although (1) their internal Alaska crude valuations justified a 2 cent GPD, (2) they had been trading Alaska crudes using a 2 cent GPD and (3) they knew a 5 cent GPD for Alaska crude was "unrealistic", "indefensible", had "no economic or technological reason" and was contrary to the economic self-interest of each.[57]

H. Petitioners' Price Signalling Helped Maintain Depressed Posted Prices

Petitioners and ARCO frequently communicated among themselves concerning their crude pricing. They provided each other advance notice of price changes, shared internal price forecasts and disclosed to each other calculations for prices and values of specific crudes.[58] Moreover, they told each other the reasons for their future price changes, disclosed their intentions not to change

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[56] ER 2086, 2053, 2062, 2146-48, 1929-32, 2279-81.

[57] ER 1711, 1061, 1075-76, 1144-45, 1154-56, 1496-97, 2065, 2028, 2865, 2874; 1328 ("A reduction in this price spread [the Alaska gravity penalty] would furnish arguments for those wishing to bring the price of heavy California crudes up closer to the light crudes"); 1078 ("The gravity differential change [to 2 cents] threatens California heavy crude price structure").

[58] ER 1851, 2232, 1835-36, 2419, 1122, 2003-05, 2001, 3020-22A, 2421, 2916.

prices over periods of time, discussed circumstances in which they would consider price changes and exchanged internal price forecasts for specific crudes.[59] *See United States v. United States Gypsum Co.*, 438 U.S. 422, 441 n.16 (1978) (exchanges of current price information have "consistently been held to violate the Sherman Act").

Documents reveal petitioners' own recognition that their behavior was "prejudicial to other people in the industry", could be "construed as some sort of price fixing" and was in violation of company policies against telegraphing price changes and should not be committed to writing lest it be publicly exposed.[60]

I. All Of The Petitioners Had Incentives To Fix Low Posted Prices

Each of the petitioners had economic incentives to collude. All but Texaco and Exxon were net buyers of crude at the time of the Exchange Committee meetings. Texaco and Exxon later became net buyers, and all petitioners were net buyers throughout the damage period.[61] By the mid-1960's, Texaco and Exxon had developed refining plans to run heavy crude oils based upon the expectation that heavy crude posted prices would continue to be depressed, and each was dependent on the others for access to pipelines.

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[59] ER 1835, 1851, 1122, 2001, 2003-05, 2419, 2421-23, 3020-22A. A November 1976 Union document is self-described as an "early signal to our competitors . . . to suggest to our competitors that they keep the price of heavy oils low. . . ." ER 2421.

[60] ER 1851, 3068-69, 3291, 3293. Petitioners also exchanged extensive information about West Coast crude availabilities and identities of crudes they were running in their West Coast refineries, although they considered such information proprietary and confidential and would not exchange it elsewhere in the country. ER 2842-44, 3276, 1939, 1941, 1440, 1765; 2815-16, 2846-47, 3101-02, 3103-04, 3282-83, 2965, 3036.

[61] Even when net sellers, participation by Texaco and Exxon was quite rational. They had no means, save risky litigation against their co-petitioners, to alter posted prices, which were set by pipeline owners who were net buyers.

Petitioners argue that none had any motive to depress crude prices when they were net sellers. Petitioners ignore the fact that all of them always had an incentive to purchase respondents' Wilmington oil cheaply, that none could afford to demit from the pipeline club, and that all of them profited from the underpricing scheme.

Exxon and Texaco argue that the scheme to fix crude prices was implausible because they sold more crude at posted prices than they bought and that the 1962 agreement was simply a technical revision unrelated to pricing. They contend that the necessity of using co-petitioners' pipelines provided them no incentive to join the conspiracy, citing respondents' inability to produce a document from the pipeline owners threatening to cut off access if they did not join the conspiracy. As the Court of Appeals correctly decided, these arguments are properly directed to a jury.

A. Texaco

Texaco's argument that it had no motive to enter into the conspiracy because it always had more crude than it needed (Exxon Pet., pp. 6, 21-22) is contradicted by the evidence. Texaco became a net purchaser of heavy crude before completing the modernization of its Wilmington refinery in 1967 to better refine heavy crudes.[62] Texaco states that respondents conceded that Texaco did not have an incentive to keep crude prices low. Exxon Pet., p. 6. No such concession existed. It says that it sold more than 50 million barrels of California crude oil at posted prices. Pet., p. 6. Respondents introduced evidence that during the same period, Texaco purchased over 70 million barrels for a net purchase position of 20 million barrels.[63] Respondents intro-

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[62] ER 1206, 1263. An internal document states that a proposal to increase California crude prices "would result in a very substantial loss of earnings to Texaco" because "(1) Although we appear to be a net crude marketer in California our production includes substantial quantities of royalty oil which is actually purchased." ER 1206.

[63] Texaco's purchases included 20 percent of the joint venture's total Tract 1 production, an enormous amount of crude purchased at up to $1 per barrel less than its 3-cut exchange value. Texaco argues that it would

duced evidence that Texaco's motive in improving its Wilmington refinery was to take advantage of low heavy crude prices—the same motive that prompted Exxon to build its Benicia refinery.[64] Texaco decided to modernize its refinery by 1962.[65] Texaco expected large profits from its investment which depended on continued maintenance of low heavy crude prices. ER 1208, Supp. ER 2717, 4383.

Access to the pipeline network was essential to Texaco which owned only one inadequate pipeline. Costs of alternative transportation would have been "prohibitive."[66] Texaco knew it was "at

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have been irrational for it to join a conspiracy to depress crude prices because it traded away millions of barrels of heavy crude for light crude at posted prices after the 1961-62 meetings. Pet., p. 21. Respondents introduced evidence that the trades to obtain light crudes were a part of a quota transaction, *i.e.*, a deal whereby Texaco obtained import quota tickets at a substantial discount from their market value. Texaco traded one profit opportunity (underpriced heavy crude) for a greater opportunity (discounted quota tickets). Clerk's Docket 1620, Exh. 14.

Texaco also states that as late as 1968, it was turning down opportunities to buy California crude oil at posted prices and that, instead, Texaco needed to secure outlets for its excess supply. Pet., p. 6. Texaco's own documents reveal that Texaco refused to sell crude by the early 1970's because the company was facing a crude deficit. ER 1259-60, 1263. It further states that it profited when posted prices increased and lost revenues when prices declined. *Ibid.* Respondents' evidence established that this was certainly not true throughout the 1971-77 damage period.

[64] ER 779, 798, 875.

[65] By 1967 it had added cracking and coking capacity to refine residuum. ER 3889.

[66] Texaco's Manager of Pipelines and Crude Oil Purchases and Sales wrote in 1971: "We cite the following reasons for our use of Badger Type [3-cut] Exchange arrangements: 1. The West Coast majors favor their use and we are dependent upon them for the movement of the major portion of our crude oil avails. 2. Much of our crude is lower gravity and based on the Crude Rating Statements values, cannot be exchanged on a value basis without penalty. 3. We have no alternative but to rely primarily on the use of Badger Exchanges, since the cost of trucking our exchange crude would be prohibitive." ER 1225.

the mercy" of the pipeline owners.[67] Texaco estimated that 98.5 percent of its exchange volume was on a 3-cut basis.[68] Pipeline club membership gave Texaco the necessary access and diminished the penalties involved in trading crude at posted prices.[69] As a participant in the negotiations of the 1962 agreement, it was fully aware of the purpose of the scheme when it joined the club and followed its rules.

B. Exxon

Exxon argues that it was a net crude seller at posted prices until 1969, when its Benicia refinery began operating, and that its discoveries of crude in California and Alaska caused it to prefer higher crude prices.[70]

Exxon realized no production from Alaska until 1977, near the end of the damage period, and none from the Santa Barbara properties until the later 1980's. ER 986, 1023. Exxon anticipated as early as 1962 that when its refinery opened it would be a net buyer of California crude. ER 1054. Exxon's statement that in the late 1970's it "considered closing its California refinery but decided to continue with an operation to support the demand for crude oil to help maintain higher prices" (Exxon Pet., pp. 5-6) was contradicted by respondents' evidence that Exxon retained the refinery because it was then its most profitable option. Supp. ER 150, 195.

Exxon understood it required very large volumes of heavy crude at low prices to achieve the large profits it anticipated from such a refinery.[71] It expected heavy crude prices to remain depressed.

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[67] ER 1252-53. "Over 90 percent of our domestic supply is received via other company [pipe] lines on exchange."

[68] ER 1225, 1197-98.

[69] ER 1225. Much of Texaco's own production was heavy crude which it could not exchange on a posted price basis without a loss of value. ER 1264.

[70] ER 1054.

[71] ER 904, 915, 857, 875, 779, 795, 798-99, 864-65, 880, 888, 888-A, 1033, 1049, 851-860, 901.

ER 861, 865-66, 880. Before it ever planned to enter the refining market, it knew that it would be selling crude until its refinery was built, and it also knew that posted prices for crude were below market value.[72] Nevertheless, it joined the club because it knew that pipeline access was essential because it had no pipelines.[73]

Exxon sent scouts to study the California market before deciding to build a refinery. They met with the Majors and were told in confidence as early as 1965: (1) how the 3-cut exchange system worked;[74] (2) that the California refiners "worked closely together"; (3) that 3-cut exchanges were used because posted prices did not reflect crude values and (4) that pipeline club members refused to trade crudes of unequal quality on a posted price basis.[75]

Exxon's argument that it would have fought the club, rather than join the conspiracy to depress prices of heavy crude, might persuade a jury, but it cannot sustain summary judgment. The risks of such litigation against its world market peers could hardly be viewed as an attractive alternative to operating a profitable refinery and achieving access to the pipeline network.

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[72] ER 782, 1054, 875, 864-65.

[73] ER 865, 886, 888-A, 1034. Exxon fully understood without explicit threats that it was subject to the market power of the pipeline owners. Exxon's petition admits that its exchange partners "required" it to engage in 3-cut exchanges. Exxon Pet. at 21. Without such exchanges Exxon could not move its crude to its refinery. Respondents refuted Exxon's argument that it did not need pipeline club membership successfully to do business in the market because its pipeline needs were supplied by non-defendant Getty. Pet., p. 17. Before its acquisition, Getty was also a member of the pipeline club. Moreover, Exxon's crude was tributary to Socal's line, as well as to Getty's, and two of its three large 3-cut exchanges for movement of its crudes were with Socal. ER 841.

[74] ER 840-42, 848, 850, 834.

[75] ER 821, 824, 828, 842, 848.

PETITIONERS' EXPLANATIONS OF THE 3-CUT EXCHANGE ARE CONTRADICTED BY THE RECORD

To escape the web of the price-fixing conspiracy, petitioners argue that the 1962 agreement was simply a "technical revision" which did not fix prices on exchanges and which had no effect on posted prices. The argument fails on the record, on elementary economic principles and on controlling authority.

1. Petitioners argue that the 3-cut exchange agreement was merely a means of creating market efficiencies among refiners by saving transportation costs. Socal Pet., p. 5. Transporting crude through pipelines is efficient. The formulae were not used to improve transportation efficiency. They only priced exchanged crudes. The pricing code was not earlier used on exchanges in California, and it was never used anywhere else. When it was virtually abandoned in the mid-1970's, no disruption of the transportation system occurred. Petitioners have offered no evidence to demonstrate any competitive efficiencies flowing from the 1962 agreement.[76]

The complex and costly formulae were irrelevant to the enjoyment of the efficiencies of crude oil exchanges and pipelines. That efficiency is fully achieved using posted or individually negotiated

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[76] It is no defense to price-fixing that the agreement served some other purpose by creating some kinds of efficiencies. *E.g., Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982) (maximum fee schedule for competing physicians *per se* unlawful despite effectiveness as a cost-containment mechanism saving patients' and insurers' money); *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980) (price visibility removal of barrier to market entry no defense to price-fixing); *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978) (banning competitive bidding to minimize risk of inferior engineering work no defense to price-fixing); *United States v. Masonite Corp.*, 316 U.S. 265 (1942) (despite desirable consequences and good business reasons for price-fixing arrangement, scheme was illegal *per se*); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) (beneficial results from increasing depressed gasoline prices no defense to price-fixing); *Federal Trade Comm'n v. Superior Court Trial Lawyers Ass'n*, ____ U.S ____, Supreme Court Docket Nos. 88-1198, 88-1393 (Jan. 22, 1990) ("[I]t is not our task to pass upon the social utility or political wisdom of price-fixing agreeements").

prices to value any differences in quality or quantity among exchanged crudes.

In fact the formulae sacrificed efficiency for secrecy. While complexity made the formulae difficult to penetrate, it also created an administrative nightmare for club members. It involved costly laboratory testing, sampling, compositing, storage and shipment of samples, crude assays, development of uncontrollable cut imbalances on books of account, account discrepancies between the exchange partners, and difficulty in settling cut imbalances involving negotiation of byzantine three and four party clearinghouse book transfers of cuts.[77] Substantial cut imbalances amounting to hundreds of thousands of barrels persisted for many years.[78]

2. Contrary to petitioners' argument (Socal Pet. p. 11), the question whether a particular pricing agreement is *per se* illegal does not turn on whether the agreement is proved by direct or circumstantial evidence.[79] However proved, an agreement setting prices among horizontal competitors is *per se* illegal if it threatens "the proper operation of our predominately free-market economy

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[77] ER 962, 1109-10, 1900, 1968, 1969, 1978-80, 2434, 3025, 3064, 3129-30, 3216-17, 3238-39A, 998, 1999, 3012-13, 3029-30, 1906, 1967.

[78] ER 959, 1028, 1031, 1217-18 , 1897-99, 2405-07, 2408, 2259, 3029-30, 1963.

[79] Petitioners rely on language from the Court of Appeals' opinion indicating its reluctance to hold the 3-cut exchange agreement illegal *per se* because the court was unsure whether the agreement had procompetitive aspects. The court said: "Whatever the effect of the three-cut exchange is on posted prices, the agreement concerning the exchanges themselves cannot be flatly classified as a price-fixing arrangement." Socal Pet. App., p. 8a.

If respondents' evidence that the purpose was to depress posted prices is ultimately credited by the trier of fact, the case cannot be successfully distinguished from *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 219-20: "Proof that there was a conspiracy, that its purpose was to raise prices, [here to depress prices] and that it caused or contributed to a price rise [here stability at depressed prices] is proof of the actual consummation or execution of a conspiracy under § 1 of the Sherman Act."

—that is, whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, and in what portion of the market, or instead one designed to 'increase economic efficiency and render markets more, rather than less, competitive.' " *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 19-20 (1979). Petitioners have not even begun to demonstrate that the effect of the challenged price-fixing agreement was to increase economic efficiency and render the relevant crude market more competitive.

RESPONDENTS PRIMA FACIE PROVED THE CONSPIRACY

In addition to proving the explicit agreement among petitioners, other direct and circumstantial evidence provided an abundance of plus factors *prima facie* establishing every element of a price-fixing conspiracy.

The posted price-fix could never have worked unless all members of the pipeline club followed the rules of the game. Those rules included never bidding against each other either on the exchange or in the public markets. No legitimate business justifications existed for paying each other higher than posted prices on exchanges. If prices in the exchange market reflected refinery values, so should posted prices. If the formulae provided a better measure of crude quality than gravity, why did petitioners not post prices based on refinery product yield instead of gravity? The crude was identical in both markets: exchanges were made before the crude even left the Wilmington field.

Direct and circumstantial evidence was used to establish petitioners' subjective intent to fix posted prices, and respondents produced ample evidence for that purpose.

REASONS FOR DENYING THE PETITIONS

Petitioners' arguments are based on two premises both of which are wrong: (1) the district court's findings were not controverted or, if they were, that court could properly decide issues of credibility, resolve conflicts and weigh the evidence on summary judgment; and (2) respondents' proof of conspiracy rested alone

on circumstantial evidence such as conscious parallelism. Based on these erroneous premises, petitioners argue that *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), required the Court of Appeals to affirm.

Petitioning separately, Exxon and Texaco argue that even if their co-petitioners conspired, Exxon and Texaco had no incentive to join a conspiracy to depress posted prices, and the Court of Appeals erred in failing separately to consider the evidence as to each of them. Again, the record belies their contentions.

A. Triable Issues Of Fact Foreclosed Summary Judgment

Petitioners have steadfastly refused to cite or even acknowledge respondents' evidence contradicting the "findings" of the district court. Instead, they rely on the findings themselves as if they were made by a trial court following a non-jury trial on the merits. The district court "tried" the case on summary judgment in violation of settled principles of summary judgment law. *E.g., Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

B. Respondents' Evidence of Conspiracy Was Direct, Not Only Circumstantial

Without citing respondents' direct evidence, petitioners argue that respondents relied on circumstantial evidence alone because the district court concluded that the 1962 agreement did not fix exchange prices or, if it did, that those prices did not adversely affect posted prices. Therefore, they contend, supported only by their characterization of passages in the Court of Appeals' opinion, that all of respondents' evidence must have been circumstantial.

Petitioners have tried to distract the Court from respondents' direct evidence that the 1962 agreement adopted exchange pricing formulae to which all petitioners adhered, that their purpose and intent in adopting such formulae was to maintain depressed posted prices for heavy crude and that the scheme succeeded in creating two-tiered pricing for the same crude in the same oil field —a phenomenon unheard of in a competitive market.

On respondents' evidence, the 3-cut exchange agreement was a horizontal price-fixing agreement forbidden by *United States v.*

Socony-Vacuum Oil Co., 310 U.S. 150. It was a dual price-fix because it set exchange prices as well as posted prices. The exchange market-price-fix gave petitioners the means for maintaining depressed posted prices.[80]

Such an agreement is the "archetypal example" of an anticompetitive practice. *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980). Whatever economic arguments may be used to attempt justification of a horizontal price-fixing agreement, "they are all banned because of their actual or potential threat to the central nervous system of the economy." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. at 224, n. 59.[81]

Circumstantial evidence simply reinforced the conspiratorial nature of the agreement and its purpose to create and to maintain the two-tiered pricing system. The complexity of the scheme and the nightmarish administrative problems its created for petitioners, the rigging of Alaska crude prices and the exchange of advance pricing information among them buttressed the direct evidence of petitioners' conspiratorial scheme and its illegal purpose.[82]

When, as here, an antitrust plaintiff has produced direct evidence that horizontal competitors entered into an explicit agreement adopting formulae to set prices, no examination of their reasons for doing so need be probed. To complete their *prima*

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[80] In *Socony-Vacuum* the Court concluded that the raising and maintenance of spot market gasoline prices "were but the means adopted for raising and maintaining prices to jobbers and consumers." 310 U.S. at 191.

[81] *Accord: Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 346-347 (1982) ("We reaffirm what we said in *United States v. Socony-Vacuum Oil Co. . . .*"); *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305 (1956).

[82] The Socal petitioners say: "There is not a shred of evidence anywhere in the record to support a theory of a four-company conspiracy." Socal Pet., p. 26. What respondents did produce was direct evidence of an eight-company conspiracy (all petitioners, plus ARCO and Getty).

facie case, respondents were only required to produce sufficient evidence to go to a jury that the price-fixing agreement caused some antitrust injury to respondents within the meaning of § 4 of the Clayton Act. *E.g., Zenith Radio Corp. v. Hazeltine Research,* 395 U.S. 100 (1969); *Continental Ore Co. v. United Carbide Corp.,* 370 U.S. 690, 697 (1962). Respondents, as sellers of crude oil produced abundant evidence for that purpose.

Texaco and Exxon argue that evidence to connect them with the conspiracy was only circumstantial and that they had no motive to join a conspiracy to depress posted prices because they were net sellers of crude at posted prices. Respondents' evidence contradicted them. Texaco was present when the 1962 agreement was negotiated. Exxon was not present at creation, but it, too, joined the pipeline club and both followed all the rules of the members' game. As this Court said in *United States v. Masonite Corp.,* 316 U.S. 265, 275-76, the purpose and the effect of the 1962 agreement were known to both of them:

> "The circumstances surrounding the making of the 1936 [1962] agreements and the [subsequent] joinder . . . of the two other companies leave no room for doubt that all had an awareness of the general scope and purpose of the undertaking. As this Court stated in the Interstate Circuit case (306 U.S. p. 227 . . .): 'It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators. . . . Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act.' "

Respondents produced ample evidence contradicting the assertions of Texaco and Exxon that they had no incentive to join a conspiracy in which an objective was maintenance of low posted prices. Although Texaco and Exxon did not initially derive as much benefit from depressed posted prices, their long-range plans were based on continued underpricing of heavy crude. A key factor in Texaco's modernization of its Wilmington refinery and Exxon's decision to enter the refining market and build its Benicia

refinery designed specifically to process heavy crude was the expectation that underpricing of heavy crudes would continue into the 1980's. Although the Court of Appeals did not expound at length on the evidence linking Texaco and Exxon to the conspiracy, the Court recognized the critical importance to those petitioners of pipeline access, low priced crudes to implement their long-range plans and the knowledge of each that continued underpricing of heavy crudes would make them profits.[83]

All of the petitioners knew that if competition had broken out either in the exchange or open markets, the system would have fallen apart. All petitioners insured that it did not fall apart in trading either California or Alaska crudes. The declarations of independence by Exxon and Texaco must be addressed to a jury.

Although the reasoning in the Court of Appeals' opinion was far more favorable to petitioners than the record justified, its conclusion is unassailable. The petitioners were not simply moving on parallel tracks, they were interlocked in their 3-cut exchanges on their pipeline network. They did not merely follow one another's prices, they all used the same pricing formulae. They did not belong to separate clubs following similar patterns of conduct, they were horizontal competitors belonging to the same club, obedient to the same rules. Adherence to those rules was a material cause of respondents' antitrust injury. No more evidence was necessary to take the case to a jury.

Petitioners' reliance on *Matsushita* is totally misplaced. In that case, plaintiffs charged a Japanese cartel with an implausible conspiracy to monopolize the American consumer electronics market by underpricing its products for 20 years. Plaintiffs produced no direct evidence of any combination related to a predatory pricing scheme upon which their claim for antitrust injury was based. Defendants produced justifiable reasons for their pricing activity, and plaintiffs failed to produce any evidence that the cartel had any rational reason to engage in the alleged predatory pricing conspiracy, the success of which was highly

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[83] As in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), the evidence revealed " 'a meeting of minds in an unlawful arrangement.' " (*Id.* at 764), and all of the petitioners played by " 'the rules of the game' ". (*Id.* at 766).

improbable from the outset. Moreover, if any such scheme ever existed, it had failed and the market was not monopolized.

Respondents' evidence is light years away from *Matsushita*. A price-fixing agreement was directly proved, plausible incentives for concerted action by all petitioners were established, benefits to each participant were contemplated and received, and the scheme was successful in fixing prices paid to respondents and other independent producers. It is the inference of independent action that is implausible in this case.

Petitioners' attempt to demonstrate a conflict among the circuits over the interpretation and application of *Matsushita* provides no reason to grant the petitions in this case because the claimed conflicts are irrelevant to the issues created by this record.[84]

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[84] Petitioners attempt in vain to demonstrate a relevant conflict among the circuits. *Park v. El Paso Bd. of Realtors*, 764 F.2d 1053, 1060-61 (5th Cir. 1985), *cert. denied*, 474 U.S. 1102 (1986), in fact, predates *Matsushita*. Petitioners rely on vertical restraint cases irrelevant to this horizontal price fixing case. In petitioners' Eighth Circuit case, *McCabe's Furniture, Inc. v. La-Z-Boy Chair Co.*, 798 F.2d 323, 330 (8th Cir. 1986), *cert. denied*, 108 S.Ct. 1728 (1988), the court ruled for defendant manufacturer in a vertical dealer termination dispute and applied the principles of *Matsushita*. The Eighth Circuit in vertical restraint cases routinely weighs competing inferences, contrary to petitioners' assertions (*e.g., Ryko Mfg. Co. v. Eden Services*, 823 F.2d 1215, 1229 (8th Cir. 1987) *cert. denied*, 484 U.S. 1026 (1988)), as does the Eleventh Circuit. *E.g., Dunnivant v. Bi-State Auto Parts*, 851 F.2d 1575, 1579-83 (11th Cir. 1988). The Eleventh Circuit case petitioners stress as evidencing the alleged conflict, *Helicopter Support Systems v. Hughes Helicopter*, 818 F.2d 1530 (11th Cir. 1987), is another vertical dealer termination case. *Helicopter* specifically applied principles from *Matsushita*, holding that (1) the conspiracy was economically reasonable (*Id.* at 1534), (2) the evidence tended to exclude the possibility of independent action (*Id.* at 1535), and (3) there was direct evidence of a price-fixing conspiracy. *Id.* at 1536. *Long Beach I* is not a proper case for addressing a purported conflict among vertical dealer termination cases.

CONCLUSION

Respondents carried their burden on summary judgment of proving every element of their *prima facie* price-fixing case. The Court of Appeals correctly decided that triable issues of fact foreclosed summary judgment in petitioners' favor. The district court's findings of fact could not be sustained without rewriting settled summary judgment law.

Even if any conflict existed among the circuits in interpretation of *Matsushita*, resolution of those conflicts would not overturn the decision of the Court of Appeals reversing the district court's summary judgment.

If a writ of certiorari were granted in order to correct flaws in the Court of Appeals' rationale, *Socony-Vacuum* would dictate affirmance because the 1962 agreement cannot successfully be distinguished from the horizontal price-fixing conspiracy condemned as a *per se* violation of §1 of the Sherman Act in that case. The Court has just reaffirmed *Socony-Vacuum* in *Federal Trade Comm'n v. Superior Court Trial Lawyers Ass'n* ____ U.S. ____, Supreme Court Docket Nos. 88-1198, 88-1393 (Jan. 22, 1990).

The history of this case is a melancholy testament to the abuse of pretrial procedures to avoid ever trying a case. This case should have been tried on the merits more than ten years ago. Further delay in bringing this case to trial should not be countenanced.

The petition for writ of certiorari should be denied.

DATED: January 25, 1990

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Supreme Court, U.S.
FILED
JAN 30 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

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OCTOBER TERM, 1989

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v.

THE CITY OF LONG BEACH and
the STATE OF CALIFORNIA,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITIONERS' REPLY BRIEF

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TABLE OF AUTHORITIES

Cases Page

First Nat'l Bank of Ariz. v. *Cities Serv. Co.*, 391 U.S. 253 (1968) 6
In re Workers' Compensation Ins. Antitrust Litigation, 867 F.2d 1552 (8th Cir.), *cert. denied*, 109 S.Ct. 3247, 110 S.Ct. 72 (1989) 4
Matsushita Elec. Indus. Co. v. *Zenith Radio Corp.*, 475 U.S. 574 (1986) ..... *passim*
Monsanto Co. v. *Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984) 4
Park v. *El Paso Bd. of Realtors*, 764 F.2d 1053 (5th Cir. 1985), *cert. denied*, 474 U.S. 1102 (1986) 4
Parkway Gallery Furniture, Inc. v. *Kittinger/Pa. House Group*, 878 F.2d 801 (4th Cir. 1989) 5
Theatre Enterprises, Inc. v. *Paramount Film Distrib. Corp.*, 346 U.S. 537 (1954) 5
United States v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) 2

Other Authorities

Brief for the United States as *Amicus Curiae*, On Petition For A Writ of Certiorari, *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, No. 83-2004 (Jan. 4, 1985) 5

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PETITIONERS' REPLY BRIEF

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1. Respondents' central argument in opposition to the petition is astonishing. Respondents have abandoned as indefensible the rationale of the court of appeals; instead, they baldly state that "[t]his case does not raise the question posed by the petitioners" because, contrary to the express holdings of both courts below, "respondents produced *direct* evidence" of a price-fixing agreement. Resp. Br. i (emphasis in original). Respondents then devote virtually their entire brief to describing what they regard as "direct evidence" of a price-fixing conspiracy.

The short answer to respondents' brief is that both the district court (which reviewed in detail the documents plaintiffs cite) and the court of appeals (which

squarely addressed the question) expressly rejected this exact argument. The district court ruled that "[t]he plaintiffs have no direct evidence of such a [price-fixing] conspiracy. . . ." App. A-29. The court of appeals concluded that "[t]he city has provided no direct evidence that such a conspiracy or conscious parallelism occurred." *Id.* at A-10. However "inartistic" the language of the court of appeals opinion (Resp. Br. 4), there is no ambiguity about its holding that this is a circumstantial-evidence case. Respondents' insistence on arguing this point is therefore mystifying.

A point-by-point refutation of respondents' claims of "direct evidence" is not only inappropriate in this reply, it is unnecessary. As both courts below recognized, and as even a cursory review of respondents' brief in opposition confirms, respondents have no direct evidence of any *agreement* among petitioners to fix or maintain prices.[1] At most, respondents have evidence of parallel pricing and parallel conduct. But it has long been settled, at least until the decision below, that evidence of conscious parallelism is legally insufficient to support an inference of an agreement to conspire. Pet. 26-28. Respondents do not contest that the court of appeals committed this critical legal error, nor do they contest that the court of appeals failed to address whether respondents' hypothesis

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[1] In particular, the court of appeals squarely held that the agreement to define the three cuts of a barrel of crude oil "cannot be flatly classified as a price-fixing arrangement" and therefore is not "unlawful *per se*." App. A-8. The district court directly rejected respondents' assertion that the 1961-62 technical meetings, at which petitioners agreed to revise the definitions of the three cuts, are direct evidence of a conspiracy to fix prices. *See* App. A-44 to A-46 ("There is no indication from the documents or from the depositions or declarations of the participants at the meetings that there was any discussion with respect to posted prices"). Respondents' reliance on *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), is therefore misplaced, because there plaintiff introduced direct evidence of an agreement to fix prices. *Id.* at 183, 189.

of conspiracy is a more plausible explanation of this conduct than that put forward by petitioners. Where, as here, petitioners have provided independent and legitimate reasons for parallel conduct that are at least as plausible as respondents' hypothesis of conspiracy,[2] petitioners are entitled to summary judgment. At a minimum, in light of *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986), this issue warrants review by this Court.

The approach taken by respondents is not a proper basis for denying the petition. After 14 years of litigation, the district court concluded that there was insufficient evidence to support a finding that the inference of conspiracy was more probable than the inference of independent action. The court of appeals eschewed that analysis in favor simply of analyzing whether the evidence was sufficient to require a jury trial. If these courts erred in rejecting respondents' direct-evidence theory, this Court should correct that error now.[3] In any

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[2] Specifically, petitioners put forward independent and legitimate reasons for each of the core elements of respondents' circumstantial-evidence case: posting parallel prices (see Pet. 8), engaging in three-cut exchanges (*id.* at 5-6, 10), calculating refining values that were higher than posted prices (*id.* at 4-5; see App. A-47 ("A refiner is not obliged to pay more than market prices for crude oil even though its value to him is greater because of the efficiency of his operation.")). The remainder of the respondents' so-called direct evidence (*e.g.* that regarding "the rigging of prices for Alaska crude" (Resp. Br. i)), was dismissed by the district court as (1) evidence that "tend[ed] to belie, rather than to support, the concept of an agreement" (App. A-44); (2) "speculation bordering on fantasy" (*id.* at A-52); (3) mere "speculations" (*id.* at A-43, A-54); and as the product of a "remarkable imagination" (*id.* at A-56); many of these speculations, in fact, were not even mentioned by the court of appeals.

[3] If there were any merit in respondents' direct-evidence argument, that would simply strengthen the case for granting certiorari. Because the court of appeals rejected respondents' argument that this is a direct-evidence case, respondents are foreclosed from relying

event, the Court should not deny the petition on a ground rejected by both courts below, especially when the consequence of that approach will be to leave the panel's erroneous interpretation of *Matsushita*, its unprecedented application of the doctrine of conscious parallelism and its erroneous substitution of motive for conspiracy as the law of the Ninth Circuit in cases arising under Section 1 of the Sherman Act.

2. Respondents' decision to defend the judgment below on a ground that both courts squarely rejected pointedly confirms that the Ninth Circuit's rationale is indefensible on its own terms. Respondents do not dispute that the court of appeals utterly failed to determine whether plaintiff met its burden under *Matsushita* of introducing circumstantial evidence that made an inference of conspiracy more plausible than an inference of independent action.

Respondents do argue (Resp. Br. 28 n.84) that the conflict in the circuits is limited to vertical dealer-termination cases. The dispositive point is that the standard is the same in vertical and horizontal cases, because in *Matsushita*, this Court expressly adopted as the standard for horizontal conspiracy cases the identical standard that it had earlier adopted in *Monsanto Co.* v. *Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984), a vertical conspiracy case. See Pet. 16-18. In any event, the conflict includes horizontal cases as well. See *Park* v. *El Paso Bd. of Realtors*, 764 F.2d 1053, 1060-61 (5th Cir. 1985), *cert. denied*, 474 U.S. 1102 (1986); *In re Workers' Compensation Ins. Antitrust Litigation*, 867 F.2d 1552 (8th Cir.), *cert. denied*, 109 S.Ct. 3247, 110 S.Ct. 72 (1989).

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on that theory at trial. Since respondents have not cross-petitioned on this point, the point is lost unless the Court grants the petition and allows respondents to raise the issue as an alternative ground for affirming the judgment below.

Furthermore, this is an appropriate case in which to resolve the long-standing confusion over the proper standard for inferring conspiracy in a Section 1 case because the court of appeals committed precisely the same error that the Fourth Circuit has identified other courts as committing: failing to determine whether plaintiff has presented evidence that makes an inference of conspiracy more plausible than that of independent action. See *Parkway Gallery Furniture, Inc.* v. *Kittinger/Pa. House Group*, 878 F.2d 801, 806 & n.4 (4th Cir. 1989). This error requires this Court's review for precisely the same reasons that review was appropriate in *Matsushita*:

> The decision below is one that has significant practical implications for . . . antitrust policy . . . . The immediate result of that error is that this massive, 14-year old case must proceed to trial, although the district court's grant of summary judgment very likely should have been affirmed. . . . In addition, the court of appeals' failure to apply the proper standard in evaluating evidence of conspiracy is likely to discourage district courts from resolving complex antitrust claims on motions for summary judgment in appropriate cases.

Brief for the United States as *Amicus Curiae*, On Petition For A Writ of Certiorari, *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, No. 83-2004 (Jan. 4, 1985).

3. Respondents do not even attempt to argue against granting the petition on the second question presented. Their conspicuous attempt to distance themselves from the court of appeals' description and application of "the doctrine of conscious parallelism," which respondents describe as "inartistic," amounts to an implicit concession that the analysis of the court clearly conflicts with this Court's decision in *Theatre Enterprises, Inc.* v. *Paramount Film Distrib. Corp.*, 346 U.S. 537 (1954), and with several decisions of the courts of appeals. Pet. 26-28; see Resp. Br. at 4.

In addition, respondents do not disagree that the court of appeals clearly departed from established antitrust principles in holding that a finding of motive to conspire is a sufficient basis for inferring a conspiracy (see *id.* at 25). Finally, respondents' discussion of motive simply confirms the need for this Court's review. Respondents restate both their theory, untenable after *Matsushita*, that the "long range plans" of petitioners Texaco and Exxon provided them with a plausible motive to accept millions of dollars of certain losses (Resp. Br. 26) and their position that the conspiracy "could never have worked unless all members of the pipeline club followed the rules" (*id.* at 23). In these circumstances, the court of appeals' holding that respondents demonstrated a plausible conspiracy is flatly inconsistent with *Matsushita* and *First Nat'l Bank of Ariz.* v. *Cities Serv. Co.*, 391 U.S. 253 (1968). See Pet. at 25-26.

4. Respondents conclude by asserting that "this case is a melancholy testament to the abuse of pretrial procedures to avoid ever trying a case." Resp. Br. 30. In fact, the pretrial procedures used here were patterned precisely after those employed by Judge Becker in the *Matsushita* case, which this Court expressly approved. See Pet. at 7. The real abuse here lies in the circuit court's cavalier dismissal of the district court's careful review of this record, and in the application of summary judgment and antitrust "doctrines" foreclosed by decisions of this Court.

Respondents achieved their victory in the court of appeals by relying on the same tactic they use in their brief before this Court. Throughout their brief they refer to legitimate business practices and technical aspects of the oil industry with labels such as "secret code" and "Rosetta Stone," and they assert that the individual petitioners are members of a "pipeline club" and are "the majors." No doubt respondents' rhetoric and labels will have an emotional impact on a jury. But, as the district

court understood, "a reasonable jury" after a trial in this case would not "draw an inference of liability that would be 'exercised in the realm of probability, not speculation, surmise and conjecture.'" App. 56-A. Because the court of appeals' decision has paved the way for a jury verdict based on speculation and rhetoric, and because its decision will serve only to discourage district courts from engaging in proper pretrial management and to chill procompetitive conduct, this Court should grant the petition.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

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